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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Queen's Bench Practice Court;

WITH THE

POINTS OF PLEADING AND PRACTICE

DECIDED IN THE COURTS OF

Common Pleas and Exchequer;

FROM

MICHAELMAS TERM, 1837, to TRINITY TERM, 1838.

—◆—
BY

ALFRED DOWLING, ESQ.

OF GRAY'S INN, BARRISTER AT LAW.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Queen's Bench Practice Court;

WITH THE

POINTS OF PLEADING AND PRACTICE

DECIDED IN THE COURTS OF

Common Pleas and Exchequer;

FROM

MICHAELMAS TERM, 1837, to TRINITY TERM, 1838.

—
BY

ALFRED DOWLING, ESQ.

OF GRAY'S INN, BARRISTER AT LAW.

—
VOL. VI.

LONDON:

**A. SWEET, 1, CHANCERY LANE; V. & R. STEVENS AND G. S. NORTON,
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defendant might have known that the plaintiff was abroad, and it is not sworn that he did not know that fact. On the 26th October the defendant pleaded. On the 3rd November, an order was made at the instance of the plaintiff for an amendment in the declaration. That amendment was material, and therefore the defendant was in the same situation as if the declaration was then delivered for the first time. It might happen, that the declaration originally delivered contained such a claim that the defendant did not want security for costs. But when the amended declaration was delivered, (on the 7th November), he might think that he ought to obtain security for costs. It seems to me therefore that the defendant made his application in due time for that security, and therefore that he is entitled to have his rule made absolute.

The *Attorney-General* then submitted that it could only be made absolute on payment of costs by the defendant, because it was not shewn that an application had been made to the agents of the plaintiff for the security required, before obtaining the present rule. He cited *Fletcher v. Lew (a)*, *Bohrs v. Sessions (b)*, and *Jones v. Jones (c)*.

Sir *W. Follett* contended, that in order to compel the defendant to pay costs as a condition of obtaining his rule, on the ground that no previous application had been made, the want of that application ought to be shewn by the plaintiff. All that was necessary for the defendant to do was to shew that the plaintiff was abroad. If the plaintiff opposed the application or desired to impose terms, it was incumbent on the plaintiff to bring forward those facts, which were to justify his opposition or the terms. The present rule was not drawn up with a stay of proceedings,

(a) 3 Ad. & El. 551.

(b) Ante, Vol. 2, p. 710.

(c) Ante, Vol. 1, p. 313.

and therefore it was unnecessary to shew that a previous application had been made. He cited *Jones v. Jones* (a), in the marginal note to which was this proposition—"The stage of the proceedings at the time of the motion need not be stated by the defendant; it is for the plaintiff to shew that it is too late." In *Fountain v. Steele* (b), the marginal note was, "It is not necessary to make a demand previously to moving for security for costs, unless it is intended to be part of the rule, that proceedings be stayed in the meantime."

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LITTLEDALE, J.—I have considered this case, and consulted the other Judges, and we think that, under the circumstances, the rule must be made absolute, without payment of costs by the defendant.

Rule absolute accordingly.

(a) Ante, Vol. 1, p. 313.

(b) Ante, Vol. 5, p. 331.

REYNOLDS v. BLACKBURN and Another.

(Before the Four Judges).

ASSUMPSIT by indorsee against the acceptors of two bills of exchange. The defendants pleaded, 1st, non-acceptance; 2nd, that they accepted the bills for the accommodation of Thomas Tempest, the drawer, without receiving any value or consideration for the said acceptances, or either of them, of which the plaintiff then had notice: and the said defendants further say, that after the bills were indorsed, and before they became due and payable, and before the commencement of this suit, the said T. T., the drawer, gave and delivered to the plaintiff, who

In assumpsit by indorsee against acceptor, the defendant pleaded a plea which was bad for duplicity. The plaintiff replied de injuria. On demurrer, the replication was held to be good.

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then accepted from the said drawer, divers other bills of exchange for divers large sums of money, in the whole exceeding the amount of the said sums mentioned in the said bills in the said declaration mentioned, to wit, &c.; and it was on that occasion agreed by and between the said drawer, T. T., and the plaintiff, that the said plaintiff, in consideration of the premises, should forbear to sue him, the said drawer, upon the said bills in the said declaration mentioned, or either of them, for a long time, to wit, for three months, and until default should be made in the payment of the said bills, so delivered by the said T. T., the drawer, to the said plaintiff, in payment of the said bills in the said declaration mentioned. And the defendants further say, that the said bills were so delivered and accepted in payment of the said bills in the said declaration mentioned, and the said agreement was so made by and between the plaintiff and the said T. T., as aforesaid, without the knowledge, privity, or consent of the said defendants, or any of them. Replication to the second plea, *de injuriâ*. Demurrer to the replication for the following causes: that the replication is double, and puts too many facts in issue; that it does not sufficiently confess and avoid the facts alleged in the plea; that it does not distinctly and formally traverse the facts alleged in the plea; that *de injuriâ* is not the proper form of a replication to a plea in an action of *assumpsit*. Joinder in demurrer.

Addison, in support of the demurrer, admitted that the cases of *Griffin v. Yeates* (a), and *Isaac v. Farrar* (b), compelled him to give up the last ground of demurrer but one. The first ground, however, he contended was sustainable. The replication *de injuriâ* was only applicable in cases where the plea alleged a single defence by

(a) Ante, Vol. 4, p. 647.

(b) Ibid., p. 750.

way of excuse. Here, however, the plea contained a partial denial of the contract, and stated a different one. He cited *Crisp v. Griffiths* (a), and *Whittaker v. Mason* (b). He should contend that the replication was clearly double. The plea contained two defences, and was perhaps demurrable; but as the replication put both defences in issue, it was consequently double.

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LORD DENMAN, C. J.—If the replication is bad for duplicity, that is occasioned by the necessity of replying to the defendant's bad plea, and cannot be taken advantage of on demurrer.

PATTESON, J.—Neither of the causes of demurrer is sufficient. This plea does not deny the contract, it merely alleges matter in excuse: *de injuriâ* is therefore a proper replication.

Judgment for the plaintiff.

(a) *Ante*, Vol. 3, p. 752.

(b) 2 B. N. C. 359.

BLAND v. WARREN.

(Before the Four Judges).

HUMFREY shewed cause against a rule nisi obtained by *Archbold*, to set aside for irregularity the verdict obtained by the plaintiff in this case. In support of the application, it was sworn that notice of trial had been given for the second sittings in Easter Term, and afterwards continued to the third sittings in that term. The plaintiff applied on the 1st April to the defendant for his consent to a continuance of the notice of trial for the sit-

If a cause is brought on pursuant to notice of trial, in its turn at the last sittings in term, when the Marshal's notice announces that none but undefended causes will be then taken, the defendant must,

in order to prevent the case from being tried as an undefended cause, either instruct counsel to appear and say it is defended, or give notice to the plaintiff that it is a defended cause.

In the Court of Queen's Bench, if a new trial has been granted on payment of costs, the Court will not point out in the rule a particular day on which the costs must be paid.

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tings after term. To this the defendant would not accede, and it was sworn that he was ready to proceed to trial at the third sittings. The sittings paper for that day stated that none but undefended causes would be then taken. On that day, however, the cause was called on, and tried as an undefended cause in the absence of the defendant, and without his knowledge. It was sworn that no notice had been given by the plaintiff that the cause would be taken as undefended. An affidavit of merits was also produced. In answer to the application, *Humfrey* now read an affidavit, in which it was sworn that the cause was set down in the regular way, and not out of its regular turn; that when at the third sittings the cause was called on, no one appeared on the part of the defendant to state that it was defended.

Archbold, in support of the rule, submitted that in order to bring on the cause as undefended, two days' notice of such a proceeding ought to be given to the other side. No such notice in the present case had, however, been given.

Lord DENMAN, C. J.—The practice is to make out a regular list in the Marshal's office, for the last sittings in term, of the causes that are thought likely to be taken as undefended. Formerly, counsel used to be instructed to appear and say that the cause was defended, upon which it would go over to the sittings after term as a matter of course. Another mode of doing this was by notice being given by the defendant to the plaintiff that the cause would be defended. In this case the cause was set down in the list for the last sittings; no counsel was instructed to appear, and no notice was given that it would be defended. I think therefore no case of irregularity has been made out. As there is an affidavit of merits, there may, however, be a new trial on payment of costs.

LITTLEDALE, J., and PATTESON, J., concurred.

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Humfrey applied that a day might be fixed on or before which the costs should be paid. If the Court did not make such an order, the defendant might delay the plaintiff's judgment until the following term.

LITTLEDALE, J.—That is not the practice of this Court.

Rule absolute accordingly.

FIELD and Another v. Woods.

(Before the Four Judges).

CHANNELL shewed cause against a rule nisi obtained by *Payne* for a new trial. It was an action of assumpsit on a banker's cheque drawn by the defendant, and dated the 12th June, 1835. The defendant pleaded that he did not make the cheque in manner and form as alleged in the declaration. The cause was tried before Mr. Justice *Williams*, and the cheque was put in and read in support of the plaintiff's case. On the part of the defendant it was contended that the cheque had been post-dated, and consequently required a stamp. In answer it was objected that this defence was not available under the present plea. The point was reserved by the learned Judge, and the jury found a verdict for the plaintiff. The present rule for a new trial was accordingly obtained. *Channell* contended—first, that the objection on the ground of the cheque not being stamped was too late, after the instrument had been read; as it should have been taken when it was first produced at the trial. Secondly, if the objection was to be made available at all, it must be by way of plea. The 55 Geo. 3, c. 184, s. 12, provided that a person issuing a draft or order for the payment of money, bearing date subsequent to the day on which it shall be issued, shall be

The objection, that a cheque is post-dated, and therefore requiring a stamp, is not too late after it has been read without objection.

If unstamped, it cannot be used in evidence.

It is not necessary to plead specially the fact of the post-dating.

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liable to a forfeiture of 100%. The defence here proposed to be set up, depended on the allegation that the contract proved in fact was void in law. According to the principle of the new rules, therefore; this being a defence by way of confession and avoidance, ought to have been specially pleaded. Then it appeared by the cases of *Upston v. Marshall* (a), and *Williamson v. Garratt* (b), overruling *Allen v. Keeves* (c), and *Whitwell v. Bennett* (d), that if a cheque bore a particular date, that must be considered as the time to which the schedule of the 55 Geo. 3, c. 184, referred. The result of *Williamson v. Garratt* was, that a post-dated bill of exchange was receivable in evidence. If that was so, a post-dated cheque might be received.

Payne, in support of the rule, contended that the objection was taken sufficiently early, when, from the inspection of the instrument, it appeared that the defect in the plaintiff's title for want of a stamp existed. It could not be known until the instrument was produced that it required a stamp. He cited *Jones v. Fort* (e). In *Williamson v. Garrett* the only question was whether a sufficient stamp had been used. *Allen v. Keeves* was directly in point. With respect to pleading such a defence, that could not be considered necessary after the cases of *M'Dowall v. Lyster* (f), and *Dawson v. M'Donald* (g).

LORD DENMAN, C. J.—I do not see how it is possible to distinguish this case from the two last cited. Here is an instrument which on the face of it is good, but which on the evidence produced requires a stamp. *Dawson v. M'Donald* was a case where the defendant, who was

(a) 3 D. & R. 193; S. C. nom.

Upstone v. Marchant, 2 B. & C. 10.

(b) 2 N. & M. 49; S. C. nom.

Williams v. Jarrett, 2 B. & Ad. 32.

(c) 1 East, 435.

(d) 3 B. & P. 559.

(e) 1 Moo. & Mal. 196.

(f) 2 M. & W. 52.

(g) Ib. 26.

sued as acceptor of a bill of exchange, wished to plead that the bill was improperly stamped; and *Parke*, B., said, "The only consequence of the wrong stamping is, that the instrument cannot be given in evidence. Allowing such pleas as this only raise doubts at the bar where none really exist."

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LITTLEDALE, J.—I had some doubts at first whether Mr. *Channell* was not right, as the 31 Geo. 3, c. 25, is not mentioned in 55 Geo. 3, c. 184; but upon looking at the latter statute, I think the words are sufficiently large to include this case. The words in the schedule under "Bill of Exchange," shew that a bill of exchange requires a stamp. Then there is an exemption for all drafts or orders for the payment of money to the bearer on demand, provided the same shall bear date on or before the day when the same shall be issued. But this instrument did not bear date on or before the day when it was issued, and therefore it is not within the exemption. Then the 31 Geo. 3, c. 25, enacts that no bill of exchange shall be given in evidence unless it is duly stamped. It appears in point of fact that the instrument was read. Certainly the late practice at nisi prius has been, that if once a document is read it has not been allowed to be struck out of the Judge's notes. But there is a difference between those cases where the defect appears at once, as on a bill of exchange, or a deed having more than the right number of words, and this, where the defect is not at once visible. Here, the objection could not be raised till the defect was pointed out by extrinsic evidence, or if raised, could only have been de bene esse: and therefore, I think the objection need not have been made on the first production of the instrument. The cases in the Exchequer are certainly not distinguishable from the present.

PATTESON, J.—I cannot doubt that the 55 Geo. 3, c. 184,

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incorporates the 31 Geo. 3, c. 25, so as to raise this question. Section 19 of the latter act provides that no bill of exchange, liable to be stamped as directed by that act, shall be pleaded or given in evidence, or admitted to be available in any Court, unless duly stamped. Now this cheque was not given in evidence; it was only *primâ facie* evidence; and the reason why it is not evidence is, that the 55 Geo. 3, c. 184, schedule, directs that every bill of exchange, draft, or order to the bearer of any sum of money, shall bear a stamp; and then certain exemptions are stated. In order, therefore, to take this draft out of the enacting provision, it should be shewn to come within the exemption. It clearly does not. Therefore the circumstance of the instrument being read, clearly does not satisfy the provisions of the 31 Geo. 3, of its being "given in evidence." Being so, is it necessary that these facts should be pleaded? There is nothing in the new rules to require it. The defence is not in confession and avoidance, admitting that it was a good contract, but says that it is altogether void in law. I cannot distinguish it from *M'Dowall v. Lyster* (a).

Rule absolute (b).

(a) 2 M. & W. 52.

(b) *Williams, J.*, was in the Bail Court.

Ex parte SOUTHERN.

Where a clerk has given his notices previous to E. T., for admission in T. T., but he does not apply for admission in that term, the Court will not allow him to be

admitted on those notices in the following M. T.; but under peculiar circumstances, will enlarge his certificate, and allow him to give notice then of admission on the last day of H. T.

PETERSDORFF, on the 14th of November, applied on behalf of a gentleman named Southern, for leave that he might be admitted an attorney of this court in the present term. The affidavit which supported his application stated, that previous to last Easter Term, the usual notices had been given for the purpose of admission in

Trinity Term, pursuant to the rules of H. T. 6 W. 4(a). In Trinity Term he was examined pursuant to the rules of E. T. 6 W. 4(b), and obtained his certificate. At that time he was informed, that the certificate which he had obtained would entitle him to be admitted at any time in the present Michaelmas Term. He had obtained his fiat for admission, and the object of the present application was, that he might be admitted in the present term, under the peculiar circumstances of the case, notwithstanding 5 Reg. Gen. H. T. 6 W. 4 (a), the words of which were, "that three days at the least before the commencement of the term next preceding that in which any person not before admitted shall propose to be admitted an attorney of either of the courts, he shall cause to be delivered at the Master's or Prothonotary's office, as the case may be, instead of affixing the same on the walls of the courts as now required, the usual written notices, which shall state, in addition to the particulars now required, his place or places of abode or service for the last preceding twelve months."

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LITTLEDALE, J.—If I were to grant this application, I should in fact be dispensing with the rule of court. Under the peculiar facts of this case, I will allow the period within which the certificate is to be in force to be enlarged, and notice to be given now, for his admission on the last day of Hilary Term.

Rule accordingly.

(a) Ante, Vol. 4, p. 554.

(b) Ante, Vol. 5, p. 1.

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REGINA v. The Justices of SALOP.

A parish is not "aggrieved," within the meaning of the 13 & 14 Car. 2, c. 12, s. 2, notwithstanding the 4 & 5 Will. 4, c. 76, ss. 79 & 84, until the actual removal of the pauper, and therefore an appeal to the sessions next after the removal is sufficiently early.

Where a rule for a mandamus is made absolute, the costs of the application, pursuant to 1 Will. 4, c. 21, s. 6, must be made the subject of a separate application, and will not be considered by the Court on disposing of the rule.

WHATELEY shewed cause against a rule nisi obtained by *Dowling*, calling on the justices of the county of Salop to shew cause why they should not enter continuances and hear an appeal against a certain order for the removal of certain paupers from the parish of St. Mary, in the borough of Shrewsbury, in the county of Salop, to the parish of Forden, in the county of Montgomery. The facts, as they appeared on the affidavits, and with respect to which there was no dispute, were the following. On the 9th of February, in the present year, an order was made by two justices of the borough of Shrewsbury, for the removal of the paupers in question from that borough to the parish of Forden, in the county of Montgomery. On the 10th of the same month, a counterpart of that order, accompanied by a copy of the examination upon which the order was made, was transmitted by post to the overseers of the parish of Forden, pursuant to the provisions of section 79 of the 4 & 5 Will. 4, c. 76. On the 11th it was received. On the 3rd of April, the next quarter sessions was held. On the 10th of April the paupers were removed to the appellant parish. On the 9th of June a notice of appeal, in conformity with the provisions contained in section 81, of the above-mentioned act, was served on the respondent parish. On the 26th of that month, the Midsummer Quarter Sessions was held. By the rules of that Court only eleven days' notice of appeal was required; consequently, if the appellants were early enough in appealing to that sessions, sufficient notice had been given. When the appeal was called on, the respondents objected that the appeal was too late, according to the 79th section of the New Poor Law Act, and the justices, yielding to that objection, dismissed the appeal. *Whateley* now contended that the sessions were

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right in point of law, in the opinion they had formed, although the section in question was not applicable. The words of that section were, "that from and after the 1st day of November, 1834, no poor person shall be removed or removeable under any order of removal from any parish or workhouse, by reason of his being chargeable thereto or relieved therein, until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, and by a copy of the examination upon which such order was made, shall have been sent, by post or otherwise, by the overseers or guardians of the parish obtaining such order, or any three or more of such guardians, to the overseers of the parish to whom such order shall be directed." After the decisions in the case of *Rex v. The Justices of Suffolk* (a), and *Rex v. The Justices of Leicester* (b), it could not now be successfully contended, that the appeal against the order of removal must be made within the twenty-one days mentioned in the 79th section. But by reference to the words of the 13 & 14 Car. 2, c. 12, s. 2, it would be found that the words were, "that all such persons who think themselves aggrieved by any such judgment of the said two justices, may appeal to the justices of the peace for the said county at their next quarter sessions, who are hereby required to do them justice according to the merits of their cause." The question therefore was, whether the appellant parish was "aggrieved." By referring to section 84 of the New Poor Law Act, it was provided, "that the parish to which any poor person whose settlement shall be in question at the time of granting relief shall be admitted or finally adjudged to belong, shall be chargeable with and liable to pay the costs and expense of the relief and maintenance of such poor person, and such costs and expense may be recovered against such

(a) 5 N. & M. 503.

(b) Ante, Vol. 4, p. 633.

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parish in the same manner as any penalties or forfeitures are by this act recoverable: provided always, that such parish, if not the parish granting such relief, shall pay to the parish by which such relief shall be granted, the cost and expense of such relief and maintenance from such time only as notice of such poor person having become chargeable shall have been sent by such relieving parish to the parish to which such poor person shall be so admitted, or finally adjudged to belong: provided always, that no charges or expenses of relief or maintenance shall be recoverable under a suspended order of removal, unless notice of such order of removal, with a copy of the same, and of the examination upon which such order was made, shall have been given within ten days of such order being made to the overseers of the poor of the parish to whom such order is directed." From the provisions contained in this section, therefore, the appellant parish must be considered as having been aggrieved, from the time when the counterpart of the order of removal, with the accompanying documents, were served; because from that time, accrued the liabilities mentioned in the section last cited. The order after the three weeks from the time of its service could not be considered more favourably for the appellants than as an order suspended; but by the 49 Geo. 3, c. 124, s. 2, it was provided, "that when the execution of any such order of removal shall be suspended, the time of appealing against such order shall be computed according to the rules which govern other like cases, from the time of serving such order, and not from the time of making such removal under and by virtue of the same." Under these circumstances, as the appellants had not given notice of appeal at the Easter sessions, which was the next sessions after the service of the order by which they were aggrieved, their appeal at the following June sessions was too late.

Dowling, in support of the rule, contended that the

statute of the 49 Geo. 3, c. 124, was not applicable to the present case, because that referred only to orders suspended by magistrates, for reasons apparently sufficient to them. Here, however, the order had not been so suspended. The exception introduced by section 2, was an authority to shew the general rule to be that the appeal need not be made until after the removal had actually taken place. By section 1 of the 13 & 14 Car. 2, c. 12, two justices were empowered "by their warrant to remove and convey such person or persons to such parish where he or they were last legally settled." Then the second section provided, "that all such persons who think themselves aggrieved by any such judgment of the said two justices may appeal to the justices of the peace for the said county at their next quarter sessions." Construing these two sections together, it was clear, that the appellant parish could not be considered as aggrieved until the pauper was actually removed. He cited *Rex v. The Inhabitants of Norton* (a), and *Milbrook v. St. John's* (b). As to the provisions contained in section 84 of the New Poor Law act, they could not be considered as rendering the appellant parish aggrieved by the mere service of the order, since they only constituted a contingent possibility, that the appellants might have certain costs and expenses to pay. At the time of serving the order of removal, the appellants could not be certain whether the respondents would act upon it. If they never did, then of course a notice of appeal was perfectly unnecessary, as the appellants could never be aggrieved. For these reasons, it was submitted, the present rule ought to be made absolute.

Cur. adv. vult.

LITTLEDALE, J.—This seems to me a very clear case. The facts appear to be these:—On the 11th February, in the present year, a counterpart of the order,

(a) 2 Strange, 830.

(b) Cases of Settlement and Removal, pl. 88, p. 66.

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accompanied by a copy of the examination of the pauper on which the order was founded, reached the hands of the officers of the appellant parish. On the 10th April, the paupers were removed by the respondent parish. On the 9th June, the notice of appeal was served for the next Salop sessions, which were held on the 26th June. Eleven clear days' notice of appeal was thus given, pursuant to the practice of the Court of Quarter Sessions. It was objected on the part of the respondents, that the appeal was too late, and the Court was of that opinion. It seems to me, however, that the Court was bound to hear the appeal. By the 13 & 14 Car. 2, c. 12, s. 1, it is provided that two justices of the peace may "by their warrant remove and convey such person or persons to such parish where he or they were last legally settled." Then, by section 2 it was provided, "that all such persons who think themselves aggrieved by any such judgment of the said two justices, may appeal to the justices of the peace for the said county, at their next quarter sessions." The question, is then, whether the parish is to be considered as aggrieved. It seems to me, that it is by the removal of the pauper, that the parish becomes aggrieved. All the cases agree in this, and it was not a disputed point between the counsel. But the counsel who contended that the sessions were right, relied on the Poor Law Amendment Act, 4 & 5 Will. 4, c. 76. By sect. 79 of that act it is provided, "that no poor person shall be removed or removeable, under any order of removal, from any parish or workhouse, by reason of his being chargeable to or relieved therein, until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, and by a copy of the examination upon which such order was made, shall have been sent by post or otherwise, by the overseers or guardians of the parish obtaining such order, or any three or more of

such guardians, to the overseers of the parish to whom such order shall be directed." By sect. 81 it is provided, "that in every case where notice of appeal against such order shall be given, the overseers or guardians of the parish appealing against such order, or any three or more of such guardians, shall, with such notice, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement in writing under their hands of the grounds of such appeal." And then, by sect. 84, it is further enacted, "that the parish to which any poor person, whose settlement shall be in question at the time of granting relief, shall be admitted or finally adjudged to belong, shall be chargeable with and liable to pay the cost and expense of the relief and maintenance of such poor person, and such cost and expense may be recovered against such parish in the same manner as any penalties or forfeitures are by this act recoverable: Provided always, that such parish, if not the parish granting such relief, shall pay to the parish by which such relief shall be granted the cost and expense of such relief and maintenance, from such time only as notice of such poor person having become chargeable shall have been sent by such relieving parish, to the parish to which such poor person shall be so admitted or finally adjudged to belong: Provided always, that no charges or expenses of relief or maintenance shall be recoverable under a suspended order of removal, unless notice of such order of removal, with a copy of the same, and of the examination upon which such order was made, shall have been given within ten days of such order being made to the overseers of the poor of the parish to whom such order is directed." It was contended, that by construing these sections together, the appellant parish must be considered as aggrieved, by the mere sending of the copy of the order of removal; because there may be a

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liability to certain costs and expenses, pursuant to sect. 84; although there is no actual grievance at the time of serving the order, yet the appellants may become aggrieved in certain events, and therefore they must be considered as aggrieved by the mere service of the order. It appears to me that it is not so, independent of any authority. The act makes no such difference in the law, as that the parish is to be considered as aggrieved because it may have to pay certain expenses. The having to pay certain costs and expenses is a mere contingency, which may or may not take effect. But if there were any doubt upon the point, it was distinctly decided in conformity with this view in the case of *The King v. The Justices of Cornwall*, which was argued in last Easter Term, and judgment given in last Trinity Term. The facts there were precisely similar to those of the present case. The order was made there on the 6th June, and received by the appellants on the 7th. The Midsummer sessions were held on the 28th. On the 29th the paupers were actually removed. Notice of appeal was given for the October sessions. The Court there refused to hear the appeal, on the ground that the appellants should have given notice of appeal at the Midsummer Sessions. This Court, however, was of opinion that the appeal was in quite sufficient time. It seems to me, therefore, a very clear case. It does not appear to me that the appellants were aggrieved until the actual removal of the paupers, although in certain events they might be required to pay costs and expenses. The present rule must therefore be made absolute.

Dowling then applied for the costs of the rule, pursuant to 1 Will. 4, c. 21, s. 6, the words of which were, "that in all cases of any application for any writ of mandamus whatsoever, the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in

the discretion of the Court, and the Court is hereby authorized to order and direct by whom and to whom the same shall be paid" (a).

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LITTLEDALE, J.—The costs of this rule must be made the subject of a separate application. When the writ has issued, I do not know that they may not make a return to it, which will shew that they were right in refusing to hear the appeal.

Rule absolute accordingly.

(a) See 2 Dowl. Stat. 41, as to the practice previous to the passing of this act.

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BUTT applied for a rule under the 1 Geo. 4, c. 87, s. 1. His application was founded on the affidavits in the usual form, and they contained the ordinary particulars, except that no affidavit had been made by the attesting witness to the execution of the lease. The application was, however, supported by the affidavit of another person, who had sworn to the due execution of the instrument. The words of the section were, "proving the execution of the same by affidavit."

In order to obtain the usual landlord's rule provided by 1 Geo. 4, c. 87, s. 1, the execution of the lease may be proved by the affidavit of a person who is not the attesting witness.

LITTLEDALE, J., (having consulted Mr. Hill, the Clerk of the Rules), was of opinion that the omission was not material. In order to obtain this rule, it was not indispensable that the attesting witness should make the affidavit of execution.

Rule granted.

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A declaration in ejectment requiring a tenant to appear in "the King's Bench" is good, although, before leave is obtained to sign judgment, the Crown having demised, the Court has become "the Queen's Bench."

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LOCKE moved for leave to sign judgment against the casual ejector. The only peculiarity in the case was, that the notice at the foot of the declaration required the tenant to appear in "the Court of King's Bench" in Michaelmas Term next. The officer of the Court refused to take in the papers in the ordinary way, on the ground that, the King having died, the Court ceased to be the King's Bench, and therefore the tenant in possession was not bound to appear there. The declaration was served upon the tenant in possession on the 14th June, 1837, while the King was living.

LITLEDALE, J.—As it was the Court of King's Bench at the time the declaration was served, you may take a rule.

Rule granted.

 REX *v.* BYRNE.

(*Before the Four Judges*).

If an affidavit to support a rule for a criminal information contains matter slanderous of the defendant, the Court will in some cases discharge the rule without costs.

Semble, that it is not necessary the county in which an affidavit was sworn should appear in the jurat, if it does appear from the contents of the affidavit.

BLISS shewed cause against a rule nisi obtained by *R. Alexander*, for a criminal information in respect of certain slanderous words spoken by the defendant to a magistrate in the exercise of his office. *Bliss* objected to the admissibility of the affidavit, on the ground that it did not appear in the jurat of the affidavit on which the rule had been obtained in what county the deponent had been sworn. He cited *The King v. Justices of the West Riding of Yorkshire* (a), and *The King v. Cockshaw* (b). The marginal note of the latter case, which confirmed the former, was in these terms—"The county in which a defendant is sworn to an affidavit to ground a rule for a cri-

(a) 3 M. & S. 493.

(b) 2 N. & M. 378.

minal information, made before a commissioner, must appear in the jurat."

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PATTESON, J.—In the cases cited perhaps the place of swearing was totally omitted. Here, however, it appears from the contents of the affidavit.

Bliss then objected that the affidavit supporting the rule contained a quantity of matter slanderous of the defendant. That was a ground for excepting to the affidavit; and in *Sanderson's Bail* (a), the Court of King's Bench held, that affidavits containing general slanderous statements injurious to the character of bail cannot be received.

PATTESON, J.—In the case of *Thompson v. Dicas* (b), part of the marginal note was, "Where libellous and impertinent matter was introduced into an affidavit in support of a rule, the Court deprived the party of the costs of the rule, to which otherwise he would have been entitled."

R. Alexander, in support of the rule, contended that, as the words used to the magistrate were clearly actionable, the present rule ought to be made absolute.

LORD DENMAN, C. J.—The prosecutor here has introduced terms and expressions in his affidavit impertinent to the case. It ought clearly to be understood, that parties applying for a criminal information should confine themselves to the simplest statement of facts, and never introduce the slightest intemperance of language. That which is used by the prosecutor in this case, makes us hesitate to decide that he has entitled himself to that pro-

(a) 1 Chit. Rep. 676.

(b) Ante, Vol. 2, p. 93.

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tection which the Court is ever ready to throw around a magistrate. With regard to the other point on which *Rex v. Cockshaw* (a) has been cited, I think it appears to have been given up, and I should not wish to express any opinion, so as to say that the affidavit is wrong, in a case of such general practice as this.

LITTLEDALE, PATTESON, and WILLIAMS, Js., concurred.

Rule discharged, without costs.

(a) 2 N. & M. 378.

SMITH v. EGGINGTON.

(Before the Four Judges).

Trespass for false imprisonment. The defendant, as sheriff, justified under an attachment out of Chancery for a contempt, and alleged that no order for the plaintiff's discharge had been made, and no ha. cor. issued out. Replication, that plaintiff had been kept in custody for more than thirty days without being brought up to the Court, and without being cleared of the con-

tempt; that therefore it was the duty of the defendant to discharge the plaintiff, pursuant to 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, rule 5, but that defendant, though requested, would not:—*Held*, that, on the face of these pleadings, nothing shewed the defendant to be a trespasser ab initio.

Semble, that in such a case *trespass* is not maintainable against the sheriff.

Semble, that *case* could not be maintained without notice to the sheriff for what contempt the prisoner was in custody, because the rule in question does not apply to all contempts.

TRESPASS for false imprisonment during a period of two months. Pleas—first, not guilty; second, as to the assault and imprisonment, and detaining the defendant in prison for the period in this plea mentioned, part of the time in the declaration mentioned, the defendant says that on &c., there issued out of the Court of our Lord the King of his Chancery, the said Court then being held at Westminster, in the county of Middlesex, a certain writ of our said Lord the King, of attachment, directed to the sheriff of the town and county of Kingston-upon-Hull, by which said writ our said Lord the King commanded the said sheriff to attach the said Elizabeth Smith, the plaintiff in this suit, and one Joseph Dudding, so as to have them before our said Lord the King in his said Court of Chancery on the 8th day of January then next, where-

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soever the said Court should then be, there to answer to our said Lord the King, as well touching a contempt which they the said Elizabeth Smith, the plaintiff in this suit, and the said Joseph Dudding, as it was alleged, had committed against our said Lord the King, as also such other matters as should be there and then laid to their charge, and further to perform and abide such order as the said Court of our said Lord the King should make in that behalf, and that the said sheriff should thereof fail not, and that he should bring that writ with him; which said writ afterwards, &c., was delivered to defendant in this suit, who then and from thence, &c., was sheriff of the said town, &c., to be executed in due form of law, by virtue of which said writ (averment of arrest of plaintiff on the 18th December, 1834, by defendant). And the said defendant says, that he not having received any writ of ha. cor., or other writ, order, or direction, to bring the said Elizabeth Smith, the plaintiff in this suit, from the said prison to the bar of or into the said High Court of Chancery, or other competent authority to discharge the said plaintiff from his custody under the said writ of attachment, until the receipt of the order hereinafter mentioned, &c., kept and detained her in prison in the said gaol or prison, under and by virtue of the said writ of attachment, from the time of his so carrying and conveying her to prison as aforesaid, until the 31st day of March, 1835, when a certain order, made upon the 30th day of March, in the fifth year aforesaid, in a certain cause then depending in the said High Court of Chancery, wherein Richard Dudding and John Dudding were plaintiffs, and George Smith (then deceased), the said Elizabeth Smith (the plaintiff in this suit), and Joseph Dudding, were defendants, being the cause or suit in which the said writ of attachment was issued as aforesaid, but in the said order described as being a cause in which the said John Dudding and Richard Dudding were plaintiffs, and the said Elizabeth

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Smith, the plaintiff in this suit, alone was defendant, by Sir *Launcelot Shadwell*, Knight, then being Vice-Chancellor of Great Britain, whereby it was ordered that the said Elizabeth Smith, the plaintiff in this suit, should be discharged out of the custody of the defendant in this suit, as to the contempt for which the said writ of attachment was so issued as aforesaid, was duly presented and shewn to him the defendant in this suit, and thereupon the defendant forthwith discharged the plaintiff from and out of his custody, and permitted and suffered her to go at large from and out of his custody wheresoever she would. Averment of *quæ sunt eadem*. Replication to the second plea. That true it is, the said writ in the second plea mentioned issued out of the Court of our said lord the King of his Chancery, and that the defendant by virtue of the said writ afterwards, to wit, on the said 18th of December, took and arrested the plaintiff, and imprisoned her, &c., nevertheless saith that the said writ issued against the plaintiff for a contempt in not answering a certain bill before then filed in the said High Court of Chancery, against the said plaintiff, and one George Smith, and one Joseph Dudding, at the suit of the said John Dudding and Richard Dudding, in the second plea mentioned, and that the plaintiff, being under such process of contempt for not answering, was in actual custody of the defendant in the said gaol for the space of thirty days under the said writ, to wit, from the said 18th day of December, in the year 1835, and she, the plaintiff, was not, during all that time, brought to the bar of the said High Court of Chancery under process to answer her contempt, nor was her contempt, during or at the expiration of that time, or at any other time, cleared. And the plaintiff further saith, that the last of the thirty days during which the plaintiff was in actual custody under the said process of contempt as aforesaid, to wit, the said 17th day of January, in the year of our Lord 1835, aforesaid, happened in term, to wit, in Hilary term in the year las

aforesaid, and that the said John Dudding and Richard Dudding, the plaintiffs in the said suit, did not, nor did either of them, nor did any other person, although the contempt of the plaintiff was not sooner cleared, bring the plaintiff by a habeas corpus to the bar of the said Court of Chancery, within thirty days from the time of her being actually in custody in the said gaol upon the said process of contempt, but on the contrary thereof wholly omitted and neglected so to do. By reason whereof it became and then was the duty of the defendant, so being sheriff and having the plaintiff in his custody as aforesaid, to have thereupon discharged the plaintiff out of custody under the said process of contempt; and although the plaintiff afterwards and after the expiration of thirty days, to wit, on the 18th day of January, 1835, aforesaid, and often afterwards, requested the defendant to discharge the plaintiff out of his custody under the said process of contempt, yet the defendant, not regarding the statute in such case made and provided, did not, nor would, at the expiration of the said thirty days, and when he was requested as aforesaid, discharge the plaintiff out of his custody under the said process of contempt, but wholly refused and omitted so to do; and on the contrary thereof, wrongfully and against the will of the plaintiff, and contrary to the form of the statute in such case made and provided, imprisoned the plaintiff in the said gaol, and kept and detained her in prison there, in manner and form as the plaintiff hath above in her said declaration complained against the defendant. Special demurrer and joinder. The marginal note to the demurrer stated, that "the defendant will contend that he is not liable to be sued in this action under 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, rule 5, for detaining the plaintiff in custody under the attachment. He will also insist that the replication is bad, for the causes assigned as the grounds of special demurrer.

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R. V. Richards, in support of the demurrer.—In any view that may be taken of this case, it is clear that the sheriff cannot be proceeded against as a trespasser. The first arrest on an attachment out of the Court of Chancery is admitted to be lawful; the question is, what is the sheriff's duty in such a case, as rule 5 of 11 Geo. 4 & 1 Will. 4, c. 86, s. 5, enacts, "that if the defendant, under process of contempt for not appearing or not answering, be in actual custody, and shall not have been sooner brought to the bar under process to answer his contempt, the plaintiff, if the contempt be not sooner cleared, shall bring the defendant by a habeas corpus to the bar of the Court within thirty days from the time of his being actually in custody or detained (being already in custody) upon process of contempt, and if the last day of such thirty days shall happen out of term, then within the four first days of the ensuing term, &c., and in case any such defendant shall not be brought to the bar of the Court within the respective times aforesaid, the sheriff, &c., in whose custody he shall be, shall thereupon discharge him out of custody, without payment by him of the costs of contempt, which shall be payable by the party on whose behalf the process issued." Two questions arise upon this rule: 1st, whether the sheriff is bound to discharge a prisoner at the end of thirty days, without any order from the Court, or any notification of the circumstances under which he is in custody? 2nd, If under some circumstances he is bound to discharge, whether the other party is not bound to give him notice of the circumstances? The words of the rule, taken most strongly against the defendant, shew only a non-feasance, and not a trespass; for it is clear that an arrest under process, until it is set aside, forms a perfectly good justification in trespass. But it does not appear in the declaration that the plaintiff gave notice of the cause of the attachment, and therefore the sheriff's duty did not arise, as the attachment might have been for other causes than con-

tempt in not answering. If the Court should hold that the sheriff is bound to inform himself of the cause of the attachment, it would throw great difficulties upon him to ascertain the cause, as it does not appear on the face of the attachment; whereas there is no hardship in requiring the prisoner to give notice to the sheriff, or to get an order of discharge from the Court. The attachment being originally good, the imprisonment is justified by the plea, for the replication is not by way of new assignment. According to the *Six Carpenters' case* (a), if it should be now held that the attachment was a licence to take the plaintiff for thirty days, the defendant would not be a trespasser. Lastly, to make the sheriff a trespasser, it should have been averred in the record that the sheriff had notice. Actions against the sheriff on the 23 Hen. 6, c. 9, for not taking a bail-bond, are never brought in trespass. The words in that statute are, "that the sheriff shall let out of custody;" in this statute they are, "that the sheriff shall discharge," which are quite analogous. The 8 Ann. c. 14, s. 1, enacts, "that no goods or chattels shall be taken in execution without leaving a year's rent for the landlord;" but trespass has never been brought against the sheriff for omitting to do this. This is like the case of *Croser v. Pilling* (b), where the plaintiff brought an action on the case against the defendant for not directing the sheriff (in whose custody the plaintiff was, on a ca. sa., at the suit of the defendant), to discharge the plaintiff out of custody, after having had the debt and costs tendered to him, and it was held that the action would lie; but it was never imagined that trespass could have been brought. Trespass never lies for a non-feasance; *Eccles v. ———* (c). And in this case there is no act done by the sheriff; it therefore does not fall within the principle of *Winterbourne*

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(a) 8 Rep. 14, b.

& C. 26.

(b) 6 D. & R. 129; S. C. 4 B.

(c) 2 Wils. 313.

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v. *Morgan* (a). An analogous case to the present often occurs in practice, where a prisoner is detained in custody for want of a declaration; there, though the sheriff has direct notice that no declaration has been served, he is never proceeded against as a trespasser, and he is not bound to discharge the prisoner till he obtains a superseas.

Hurlstone, in support of the replication.—The sheriff is bound, under 11 Geo. 4 & 1 Will. 4, c. 36, to discharge a prisoner in custody on process of contempt, at the end of thirty days, and therefore he may be liable in this form of action. The pleadings shew that the plaintiff was in custody for contempt; that thirty days had elapsed; that the plaintiff had applied to be discharged, and that the defendant refused. This refusal is a misfeasance which will support the action. The fifth rule, which directs the sheriff to discharge, makes no mention of the necessity for an order of Court, and the clear intention of the statute was, that a prisoner should be discharged without any order being necessary. When the statute requires an order of the Court to be made, it provides for it in express terms, as in sections 13 & 15, rules 2 & 18. The intention of the statute was to bring all prisoners for contempt of the Court of Chancery into the Fleet Prison (which is the prison of the Court) as soon as possible, in order to compel answers, and to make the process effectual. In the Courts of Equity it is clearly understood that no order is requisite for the discharge of a prisoner; for *In re Duncce*, E. T. 1836, MS., where a prisoner was brought up by the sheriff to the bar of the Court after the thirty days had expired, and an order for his discharge was applied for, the Vice-Chancellor held that it was not necessary, and that he was entitled to his discharge forthwith. As-

(a) 11 East, 395.

suming then that no order was necessary, there was no attachment to warrant the sheriff in detaining the plaintiff. In 2 Inst. 53, it is said, "if the King's writ come to the sheriff to deliver the prisoner, if he detain him, this detaining is an imprisonment against the law of the land." Now, the words of this act are equally compulsory with the King's writ. Suppose a defendant in custody on a ca. sa. paid the debt and costs, and the gaoler refused to discharge him, he clearly would be liable in trespass (a).

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LORD DENMAN, C. J.—I think it is quite clear that trespass is not maintainable against the sheriff in this case, and that if he is liable at all, he should be sued in case. The case of *Salmon v. Percivall* (b) is quite in point. Where the law consigns a party to the custody of another, the latter should certainly have notice when the term of the imprisonment has expired.

LITLEDALE, J.—I am of opinion this action cannot be maintained, and that, even it could, the replication is ill drawn, for the trespass should have been newly assigned. I do not see how, in a case like this, the sheriff could be treated as a trespasser ab initio; for it cannot be made out that he had no authority to arrest and imprison in the first instance. The action therefore should have been on the case. But it does not appear that the sheriff had any notice of what the attachment was for; the replication indeed avers that it was for a contempt in not answering; but the defendant by demurring to the replication does not admit that he had any notice, and it is not for every

(a) See *Slackford v. Austen*, 14 East, 468, where it was held, that payment of the debt and costs by the defendant in custody on a ca. sa. to the sheriff, did not entitle

him to his discharge; and the law was recognised in *Crozer v. Pilling*, 6 D. & R. 129; S. C. 4 B. & C. 26.

(b) Cro. Car. 196.

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contempt that a prisoner in custody is entitled to be discharged. Without distinct notice to the sheriff of the cause of the attachment, I do not think that any action whatever could be maintained against him.

PATTESON, J.—The declaration is general for trespass and false imprisonment, and is silent as to the special facts of the case. The plea justifies under an attachment out of the Court of Chancery. Then, what does the replication say? It does not abandon the imprisonment justified under the plea, and go upon a different imprisonment, but states an abuse of it. How then does that make the defendant a trespasser *ab initio*? I think, however, trespass would not lie at all in this case, though it is not necessary to decide that expressly in this case. I would also say that no action at all would lie, for how is the sheriff to know for what contempt the prisoner is in custody? It ought to appear on the record that the party had informed the sheriff for what he was in custody; it is not, however, necessary to go into that, but only to say there is nothing in this record to shew that the defendant was a trespasser *ab initio*.

WILLIAMS, J., concurred.

Judgment for the defendant.

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SMITH *v.* DIXON.*(Before the Four Judges).*

ASSUMPSIT.—The declaration stated that whereas the defendant had bought of the plaintiff a large quantity, that is to say, not less than 5,000, nor more than 6,000 oak trees, not less than two feet and a half, nor more than three feet in height; and also 10,000 oak trees, not less than one foot and a half, nor more than two feet in height, the said oak trees respectively to be well taken up by the plaintiff at the usual time of the year, and within a reasonable time afterwards to be delivered by plaintiff to defendant's order at B., in the county of L., and paid for on delivery; and in consideration thereof plaintiff promised to take up the said oak trees as aforesaid, and to deliver the same to defendant at the time and place aforesaid: the defendant promised to accept and pay for them. The declaration then averred that the plaintiff afterwards, to wit, on the 10th February, 1835, well and properly took up for the defendant 6,000 oak trees, not less &c., and 10,000 oak trees, not less &c., which said 10th February then was the usual and proper time of the year for taking up oak trees as aforesaid. That plaintiff tendered and offered to deliver the said oak trees, but defendant refused to accept, whereby the oak trees perished and became of no value to the plaintiff. Damages 100%. The decision of the Court proceeded mainly on the second plea. It alleged that the plaintiff did not well and properly take up, or tender or offer to deliver to the defendant or his order at B. aforesaid, 6,000 oak trees, being not less &c., and 10,000 oak trees, being not less &c. The plaintiff demurred specially, and the causes of demurrer were, that it is double, in denying both the taking up and the tender: and that the traverse contained in it is too large in making the exact

The plaintiff in his declaration set out a contract for the sale of not less than 5,000, or more than 6,000 trees, to be taken up at the proper time of the year, delivered to the defendant's order, and paid for on delivery. He then averred that he took up 6,000 trees at the proper time of the year, tendered them to the defendant, and he refused to accept them. The defendant pleaded that the plaintiff did not properly take up, or tender, or offer to deliver to the defendant 6,000 trees. On special demurrer, it was held that the plea was good, although it traversed the number of trees alleged, that having been made material by the plaintiff's averment, but *bad* for duplicity, in tendering a traverse on the taking up *and* offer to deliver.

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number and exact height of the oak trees material to the issue.

Archbold supported the demurrer, and cited *Dyer*, 242, a., 15 Hen. 7, 10.

Wightman, in support of the plea, cited *Webb v. Weatherby* (a), *Dakins' case* (b), *Symmons v. Knox* (c), *Arnfield v. Bate and others* (d), *Crispin and another v. Williamson* (e).

Cur. adv. vult.

LORD DENMAN, C. J.—In this case the contract alleged in the declaration is, that the plaintiff sold to the defendant not less than 5,000, nor more than 6,000 oak trees of a certain size; and 10,000 oak trees of another size, to be well taken up by the plaintiff at the usual and proper time of the year, and to be delivered by him to the defendant within a reasonable time afterwards, at certain prices. The declaration then avers that the plaintiff did well and properly take up for the defendant, at the proper time, 6,000 oak trees of the one size, and 10,000 of the other, (without laying the number under a videlicet, or averring that the number of the first size was not less than 5,000, or more than 6,000,) and did within a reasonable time afterwards offer to deliver the said trees to the defendant.

The plea states that the plaintiff did not well and properly take up for, or offer to deliver to, the defendant 6,000 oak trees of the one size, and 10,000 oak trees of the other size, in manner and form as in the declaration alleged.

The plaintiff has demurred specially. The principal grounds of demurrer are—first, that the defendant has

(a) 1 Bing. N. C. 502.

(b) 2 Saund. 291, c.

(c) 3 T. R. 65.

(d) 3 M. & Sel. 173.

(e) 8 Taunt. 107.

made the number material by his plea, which he had no right to do. Second, that the plea is double, because it traverses not only the well and properly taking up, but the subsequent offer to deliver.

On the first ground we are of opinion that the plea is good. The plaintiff has himself made the number material by not averring that the number was within the limits prescribed by the contract. If that averment had been inserted in the declaration, the number would have been immaterial, and the question would have turned on the want of a videlicet. But, as the declaration stands, it is only by taking the number stated as material, that the declaration itself can be supported; for so only is there any averment of performance of the condition precedent to take up a number of trees within the prescribed limits.

On the other ground, we are of opinion that the plea is bad. The well and properly taking up of the trees depends on the time and manner in which it was done, and is not necessarily coupled with any subsequent offer to deliver. If the plaintiff fails to prove the well and properly taking up, the defendant would be entitled to a verdict, though there had been an offer to deliver. On the other hand, if he fails to prove the offer to deliver, the same consequence would follow, though he should establish that the trees were well and properly taken up. Formerly the plea of non-assumpsit would have put in issue both facts; but now all facts intended to be denied must be specially traversed, yet not two by one traverse, as it is here. Judgment must be for the plaintiff.

Judgment for the plaintiff.

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SMITH
v.
DIXON.

COURT OF COMMON PLEAS.**Trinity Term,****IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.****1837.****REGULA GENERALIS.**

IT IS ORDERED, that from and after the last day of this present Trinity Term, all the offices (the Secondaries' excepted) be open in term, from eleven in the forenoon until five in the afternoon, and not in the evening; and that the Secondaries' office be open in term from eleven in the forenoon until three in the afternoon, and from six o'clock until eight o'clock in the evening; and that in the Vacation, all the offices be open from eleven in the forenoon until three in the afternoon, except between the 10th day of August and the 24th day of October, when they are to be open from eleven in the forenoon until two in the afternoon only.

N. C. TINDAL.**J. A. PARK.****J. VAUGHAN.****THOS. COLTMAN.**

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DOE *d.* WADE *v.* ROE.

FISH moved for judgment against the casual ejector. The affidavit of the service of the declaration stated that it was duly served, and that it was read over to the person by whom it was received; but it did not allege that it had been explained.

“Reading over” the declaration without “explaining” it, is insufficient in order to obtain judgment against the casual ejector.

TINDAL, C. J.—We had better not get into a new form of affidavit. These proceedings are very unintelligible to common people.

Rule refused.

HOLMES *v.* EDWARDS.

HUMFREY moved for a rule to shew cause why Mr. Flicker, an attorney of this Court, should not pay to the executor of the plaintiff all costs incurred in respect of 37*l.*, found to be due on a reference of certain matters in the cause to the prothonotary, together with interest on the 37*l.* It appeared that the matters in difference between the parties had been referred to the prothonotary, who made his report. The plaintiff excepted to that as to one item, and applied for a rule that the taxation might be re-opened. The rule was not moved with costs. On being heard, an order was made that the prothonotary should inquire what was due to the plaintiff on account of one Robert Gambier in respect of 37*l.* 1*s.* 6*d.*, which it was alleged had been obtained by Flicker on account of the plaintiff, but which, Flicker denied that he had received. The money, however, was found to be due from him to the plaintiff; and this was an application for the costs incurred in that inquiry.

Where a rule to refer a matter to the prothonotary has been moved without costs, and the subject for inquiry is matter of fact only, the Court will not entertain a substantive application for costs of the inquiry after the report of the prothonotary is made.

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TINDAL, C. J.—Did you ever know a substantive application for costs under such circumstances?

Humfrey.—The application was made for interest as well as costs, which was claimed to be due for many years. It was made a part of the rule, that, if the plaintiff failed, he should pay the whole of the costs.

TINDAL, C. J.—The interest can be claimed only for six years. There is no precedent for a substantive application being made when the rule was not moved with costs, and the matter to be inquired into was a mere question of fact.

Humfrey submitted that he was entitled to an order for the payment of the 37*l*.

TINDAL, C. J.—Apply for the payment of the money first, and if it is refused, then come to the Court.

Rule refused.

STARKIE v. SKILBECK.

The defendant being insane, and a *distringas* having issued, to which there was a return of *nulla bona*, and *non est inventus*, but affidavits being produced that the defendant was a lunatic, that it was known

TOMLINSON, in Easter Term, moved for a rule for a *distringas*. The affidavit stated that the deponent had endeavoured to serve the defendant with a copy of the writ of summons, but, on applying at his residence, it was stated that he was in a state of lunacy.

PARK, J.—On whom do you propose to serve the rule?

where the defendant was living, but that his keeper refused to allow him to be seen, in order that process might be served: the Court refused to allow an appearance to be entered for him.

Tomlinson.—The rule must be served personally, if possible, on the lunatic, and on issuing the *distringas* his goods would be seized, in order to draw the attention of his friends to the subject. In the event of its being found impossible to serve the rule personally, service on the keeper of the defendant would be sufficient.

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TINDAL, C. J.—You may take a rule.

In Trinity Term, *Tomlinson* again applied for leave to enter an appearance. He had the return of the sheriff to the *distringas* of *nulla bona* and *non est inventus*, and an affidavit, in which it was stated that an attempt had been made to serve the process on the defendant, but that his keeper had declared that no man on earth should see him.

TINDAL, C. J.—There, is this difficulty in the case. By your affidavit you raise a presumption that the defendant is in existence and can be found, and you suggest as a reason for dispensing with personal service, that you are prevented from reaching him by a man in whose custody he is.

Tomlinson said, that he was most likely the person in whose care the interests of the defendant were placed. He would apply again with better affidavits.

On a subsequent day, *Tomlinson* again applied, and urged, that sufficient means had been taken to serve the defendant with process, to satisfy the provisions of the Uniformity of Process Act. He now had an affidavit that the defendant was insane, and unable to attend to his business, and that he had no goods in the county of Lancaster, but that he had some leasehold property in York. It was besides sworn, that application had been made to the keeper of the defendant, but that permission had been

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again refused to see the defendant. He cited the cases of *Cornish v. King* (a), *Balgay v. Gardner* (b), and *Piggot v. Killick* (c), in support of his application.

TINDAL, C. J.—It was suggested that some proceedings should be taken against the man in whose custody the defendant is. But why are we to go on with proceedings on a writ of summons, when you say yourself that the defendant is insane, and you cannot see him? I do not think we ought to lend ourselves to it.

Tomlinson.—The plaintiff was not the person to take out a commission of lunacy, and the friends of the defendant might refuse to do so, and set the former at defiance, and deprive him of that to which he was justly entitled. They, however, if the service were permitted to be good, and if the appearance were allowed to be entered, might plead for him. If the proceedings had been by bailable process, the plaintiff might have arrested him.

TINDAL, C. J.—I can only suggest what I have already thrown out, that proceedings should be taken against the keeper of the defendant. We cannot direct anything to be done against him, because you do not apply.

Rule refused.

(a) Ante, Vol. 2, p. 18.
(b) *Ib.* 52.

(c) Ante, Vol. 4, p. 287.

1837.

YAPP, Assignee of Partington, a Bankrupt, v. HARRINGTON.

TALFOURD, Serjt., shewed cause against a rule obtained by *R. V. Richards* for setting aside the verdict found in this cause for the defendant, and for entering a verdict in favour of the plaintiff, with 125*l.* 11*s.* damages. It was an action brought by the assignees of one Partington, an insolvent, to recover from the defendant the amount levied on the goods of the insolvent at the instance of the defendant, under a *fi. fa.* issued on a judgment signed on a warrant of attorney. The case turned upon the construction to be put upon the 34th section of the 7 Geo. 4, c. 57, (the Act for the Relief of Insolvent Debtors). The words of the section were, "That in all cases where any prisoner who shall petition the said Court for relief under this act, shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem*, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself or herself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or *cognovit actionem*, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or any part thereof, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or *cognovit actionem*, shall and may be a creditor or creditors for the same under this act." It appeared from the affidavits, that the insolvent was arrested on mesne process on the 5th November, and his goods were seized and sold under an execution at the instance of the defendant on that and the following day, and the money, the produce of the sale, was paid over to

Where the actual imprisonment of a defendant in the county gaol follows the arrest in due course, the commencement of the imprisonment under the 34th section of the statute 7 Geo. 4, c. 57, shall be taken to be the arrest, but where there is any improper delay, the imprisonment shall not be taken to begin until the defendant is in actual confinement within the walls of a prison.

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the defendant by the sheriff on the 9th December. The insolvent went to gaol on the 12th November, and the question was, whether his imprisonment for the purposes of this section of the act had not commenced before the sale. It appeared on the trial, that in the intermediate time between the 5th and the 12th November, the insolvent had been at a beer shop in Gloucester, where, however, he had not always been in the custody of the sheriff's officer, or even of his assistant, but had been suffered to quit the house in company with a man who was a friend of the assistant. It was now urged that this was not a sufficient custody to entitle the plaintiff to succeed in the present application. The 30th section of the act provided that all goods in the possession of the prisoner at the time of his "arrest, or other commencement of his imprisonment," of which he should be reputed owner, should be deemed his property. But upon the words of this section arose a question, as to what should be considered an imprisonment within the meaning of the act. The 10th section provided that any person who had been in actual custody within the walls of any prison in England upon any process whatsoever, at any time within fourteen days next after the commencement of such imprisonment, whether it should have commenced in the same or any other prison, or the rules or liberties of any other prison, might apply by petition for his discharge. The 12th section of the act was still more explicit, and provided that the act should not extend to any person who should not be at the time of filing his petition, and during all the proceedings thereon, in actual custody within the walls of a prison, without any intermission of such imprisonment by leave of the Court or otherwise. Therefore, although for certain purposes the prisoner might be said to be in custody in a lock-up house, yet it was quite clear that that was not a sufficient imprisonment under this act. The 30th and 31st sections of the statute, it was true,

alluded to "the arrest or other commencement of the imprisonment," but this was only applicable to the particular cases there pointed out. Supposing the case to be one of escape, the sheriff would clearly be liable to an action; for it could not be said that the insolvent was in legal custody, when he was under the care of a friend of the assistant of the sheriff's officer, and was permitted to walk about the town of Gloucester with him. This person clearly had no lawful authority to detain him; and the jury, by the verdict which they returned, having, in fact, found that there was no legal imprisonment. In *Tribe and another, assignees of Burchall, a bankrupt, v. Webber (a)*, it was held, that the imprisonment must be continuous, in order to constitute an act of bankruptcy. *Barnard v. Palmer (b)* was a decision to the same effect. The act must be strictly construed: *Sims v. Simpson (c)*.

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R. V. Richards, in support of the rule. The argument on the 10th section was favourable to the plaintiff, because it was said, that in order to entitle a person to petition the Court, he must have been within the walls of a prison for fourteen days; but subsequently, when the mode of disposing of the property was provided, the "arrest, or other commencement of the imprisonment," was mentioned, and the arrest therefore must be considered to be the commencement of the imprisonment. The 31st section rendered invalid a distress for more than one year's rent, after the "arrest or other commencement of the imprisonment" of any person who should petition the Court for his discharge from "such imprisonment." The 32nd section has not these words, but they must override all the sections which applied only to the distribution of the property of insolvents. Supposing, however, that the arrest was not an imprisonment within the meaning of

(a) Willes, 464.

(b) 1 Camp. 509.

(c) 1 Bing. N. C. 306.

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this act, it clearly was so at common law. The case in Campbell, which has been cited, differed from the present ; but there was one alluded to in the argument in that case, which was exactly in point. He referred to *Rose v. Green* (a). The wrongful act of the sheriff could not affect the case ; and although for certain purposes the imprisonment was not good, yet the prisoner must, in fact, be taken to be under such legal control as amounted to an imprisonment within the particular section of this statute under which the rule was obtained.

Cur. adv. vult.

TINDAL, C. J.—The principal question raised in this case for our consideration, turns upon the proper construction to be put upon the 34th section of the general Insolvent Act, which limits the time after which no one shall avail himself of any execution upon a judgment signed under a warrant of attorney or a *cognovit actionem*, given by a prisoner who petitions under that statute. The words of that section are, that no person shall avail himself of such execution “after the commencement of the imprisonment of such prisoner.” On the part of the plaintiff, it is contended that the arrest of the debtor is, within the meaning of this section, the commencement of his imprisonment ; on the part of the defendant, it is on the other hand contended, that, looking at the whole act, “the commencement of his imprisonment” is the first moment of the debtor’s being actually committed to the walls of the prison, from which moment his right to petition under the statute takes its commencement. If the answer to this question had depended upon the 34th section alone, there would have been little diffi-

(a) 1 Burr. 437.

culty in the case. The words themselves in their natural sense import the being actually in prison; and such construction of the word imprisonment appears to be warranted by reference to the 10th section of the act, which describes the persons who shall be capable of taking the benefit of the act, as "persons in actual custody within the walls of any prison;" and still more, by reference to the 12th section, which expressly enacts that the statute shall not extend to any person "who shall not be at the time of filing his petition, and during all the proceedings thereon, in actual custody within the walls of the prison, without any intermission of such imprisonment. And it is a further argument in favour of this construction of the section, that the actual imprisonment of the debtor within the walls of the prison, is a fact that may well be presumed to be notorious to his creditors, after which, any creditor holding a warrant of attorney, must be considered as taking proceedings thereon at his own peril: whereas, the precise time of the actual arrest of the debtor may be often a fact involved in obscurity and uncertainty. The difficulty, however, arises from the introduction of the word "arrest," in sections 30 and 31. The 30th section (which contains the provision as to the insolvent having goods in his possession, order, or disposition, by the consent of the true owner), begins by enacting, that if any person who shall petition for his discharge from imprisonment under the act, "shall, at the time of *his arrest, or other commencement of such imprisonment,*" by the consent of the true owner, have in his possession, &c. And the plaintiff contends, and we think justly contends, that the statute does not in this instance expressly declare that the arrest of a person is one of the modes by which his imprisonment may be commenced. And again, the 31st sect. gives room for the same observation; as it contains provisions with respect to distresses for rent made "after

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the *arrest or other commencement* of the imprisonment of any person who shall petition under the act."

That in each of these two sections, and for the purposes contained in these sections, the arrest of the prisoner is made the limit of time, after which certain consequences, therein respectively specified, are to follow, must, as we think, be admitted; nay, further, it must be admitted also, that the arrest of the prisoner is one of the modes by which his imprisonment may be commenced for the purposes of these sections. Whether the insertion of the word "arrest," as one of the modes of the commencement of the imprisonment of the debtor, in the 30th and 31st sections, and the omission of that word in the 34th, the section now under consideration, arose from inaccuracy, or from any intended distinction with respect to the subject-matter in those respective sections, may be the subject of some doubt, though it certainly is very difficult to see any reason for any such intended distinction. And, upon the whole, we think the proper construction of these sections is, that where the actual imprisonment within the four walls of the prison follows upon the arrest, as one continuous act, within the usual time allowed and required by law and the course of practice, then the arrest shall be taken to be the commencement of the imprisonment; but when, after the arrest is made, any delay not sanctioned by the due course of law takes place before the actual commitment of the defendant to prison, such as by the favour of the plaintiff, or the negligent or permissive escape of the prisoner, or any other cause of the same nature, then, not the arrest, but the actual coming within the walls of the prison is, within the meaning of the statute, the commencement of such imprisonment. For, we think great uncertainty might arise as to the right of creditors, and the validity of transactions, honest in themselves, if they were made to depend upon the happening

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of events of which the creditors had no notice; and in the particular case, it would seem to be unreasonable that an execution under a warrant of attorney, for anything that appears to the contrary, given *bond fide*, and for a valuable consideration, should be held to be voidable where it was completed before the actual imprisonment of the debtor, because such execution was not executed until after the original arrest made, in a case where the insolvent was not committed to actual imprisonment in the county gaol until after an unreasonable and unjustifiable delay. And this circumstance it is which appears to us to distinguish the present case from that of *Stevens v. Jackson and others* (a), in which case the delay of a week between the arrest of the bankrupt in his own house and his committal to prison, was accounted for "by his having been arrested in bed, dangerously ill, and incapable of being removed;" during all which interval the bailiff's follower kept the key of his house. Such a delay may well have been considered as *reasonable* under the circumstances, the duty of the officer, as observed by Mr. Justice Heath, even where the prisoner is taken in execution, being only to carry him to prison "within reasonable time." But, in the present case, the arrest of the insolvent at Cheltenham takes place on the 5th of November, and the commitment to Gloucester gaol is delayed until the 12th; and in the interval it is expressly found by the jury, that he was in custody, "not of the sheriff's officer, but of a friend of the sheriff's officer," without any excuse suggested for the delay.

We cannot, therefore, consider this intervening imprisonment as a legal imprisonment, continuing from the first arrest; and on that account we think the arrest was not in this case the commencement of the imprisonment within the meaning of the act; and that the execution

(a) 1 Marsh. 469.

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having been completed before the insolvent was actually committed to the county gaol, it is not avoided under the 34th section, as an execution after the commencement of the imprisonment of the insolvent.

Rule discharged.

DOE *d.* PEACH *v.* ROE.

In the notices attached to declarations in ejectment, each tenant being rightly named in his own notice is sufficient; and therefore, an alteration in the name of a tenant in the notices served on the others is immaterial, it being sworn that the same person is meant.

BUTT moved for judgment against the casual ejector. There were seventeen tenants, but, as to one, there was a misnomer, and he moved for judgment as against sixteen only. The real name of one of the tenants was *Ilsey*, but in one of the copies of the notice, served on one of the others, he was called *Elsley*.

TINDAL, C. J.—It is almost *idem sonans*. You swear to his being the same man?

Butt.—The affidavit is to that effect. The Christian name of one of the other tenants is *Daniel*, and in the copy of the notice served on him he is correctly named. In a copy served on another, however, he is called *Robert*. There is a third tenant, named *Jesse Sale Cooper*; a similar mistake has occurred in this instance by the omission of the word *Sale*. In another case, a man named *Triplow* is correctly named in his own notice, but in that of another he is called *Triplor*.

TINDAL, C. J.—I think that will do. The difference in the copies served on the other tenants is not material, so long as each person is rightly named in his own notice, and it is sworn that the same person is referred to.

Rule granted.

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CUNLIFFE v. WHITEHEAD.

THIS was an action brought to recover 1500*l.*, the amount of a bill of exchange accepted by the defendant. The fourth and fifth counts of the declaration alleged, that William Fraser made his bill of exchange in writing, and directed it to the defendant, requiring him to pay to him or order 1500*l.* for value received, thirty days after date; that Frazer indorsed the bill to Salomonson, Frazer, and Co., and they "*delivered* the same to the plaintiff." To this there was a general demurrer.

A declaration alleging a bill to have been made by F., requiring defendant to pay 1500*l.* to him or his order, indorsed by F. to S. & Co., and by them *delivered* to the plaintiff, is bad, as not shewing a title in the plaintiff to sue.

Crompton, in support of the demurrer.—The allegation that the bill was "*delivered to the plaintiff*" is not good, as it does not shew a sufficient title in him to enable him to sue. In *Bayley on Bills* (a) it is said, "Bills and notes are assigned, either by delivery only, or by indorsement and delivery. Whilst payable to order they are assignable by the latter mode only; if payable originally to bearer, or if indorsed, as they may be, so as to be payable to the bearer, by either." Bills, therefore, can pass by delivery only under peculiar circumstances, and otherwise they must pass by indorsement. The bill, if indorsed generally to Salomonson and Co., might pass by delivery, but if it is so, that should be shewn. The case of *Clark v. Pigot* (b) is not law now, and bare delivery will not pass a bill.

Bompas, Serjt., in support of the declaration.—This is one of the cases arising out of the new rules. There are two kinds of indorsement—a general and a qualified indorsement. The first is a mere indorsement by writing the name; the other may be done in many ways. The special indorsement is qualified; the general indorsement

(a) 5th edit., p. 121.

(b) Salk. 126.

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is an open one. The rule of T. T. 1 Will. 4 (a), sets out the form, "and the defendant then and there indorsed the same to the plaintiff." That is the form of an open indorsement. We may add to it if there be any special circumstances, but we can take nothing from it.

TINDAL, C. J.—You have not said "then and there indorsed the same to the plaintiff" only, but then and there indorsed the same to Salomonson, Fraser, & Co.

Bompas, Serjt.—The question is, whether that is a general indorsement; for the indorsement given in the new rules is not special.

VAUGHAN, J.—Then why not have alleged that it was an open indorsement?

Bompas, Serjt.—Because then it would have been said that we had no consideration from Fraser. The bill was drawn payable to Fraser or order. He was therefore bound to indorse it, and he did so to Salomonson & Co. We must make out our title under theirs, and that is by delivery, the indorsement being open.

TINDAL, C. J.—If you shew that what appears on the record gives you title to sue in your own name, you will gain your point. The declaration alleges indorsement to the plaintiff in all cases.

Bompas, Serjt.—When I am to derive my title from a general statement, it is unnecessary to negative that. If it is a general indorsement to Salomonson, Fraser, & Co., I have my title. If I had denied that it was a special indorsement, I must have denied that it was qualified in any

way. The form of a special indorsement would have been, "pay to the order of Salomonson, Fraser, & Co.;" and if the plaintiff had alleged a special indorsement, he must have said that it was indorsed to be paid to the order of Salomonson, Fraser, & Co. *Peacock v. Rhodes*(a) decides that title passes by delivery, if the indorsement be open. Lord *Mansfield* said there in his judgment: "I see no difference between a note indorsed in blank and one payable to bearer. They both go by delivery, and possession proves property in both cases." The second point is, whether the indorsement is not open and general. The indorsement is general from Fraser to Salomonson & Co. and we, who are only bankers, take it generally from them. The words of the indorsement shew it to be open, and not restrictive. Before the new rules we could have recovered, and the practice is not now altered.

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Crompton, in reply.—The question is, whether the plaintiff must not shew the bill to be in that peculiar state in which it could pass by delivery, and I do not apprehend that the new rules come at all in question. The plaintiff has not shewn the bill to be in the state required in order to pass by delivery, and the demurrer must therefore be considered good.

TINDAL, C. J.—I think, whatever may be the construction to be put on the new rules, that it is clear they were never intended to effect any alteration in the law merchant of this country, or to make a bill, which could before pass by actual indorsement only, now pass by delivery. The question is as to the position of the bill. The action is brought against the acceptor of the bill, and it is made payable to Fraser. It is clear that it requires an indorsement by him before it is made payable to any other person. The declaration then alleges that he indorsed it

(a) 2 Douglas, 633.

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to Salomonson & Co. Now, let us pause at this allegation of the indorsement. The time was when it was considered that it would not pass by a subsequent indorsement, and certainly not by delivery; but the case of *Edie and another v. The East India Company* (a), settled that a subsequent indorsement, when the word "order" is omitted, makes it so transferrable. So it is quite clear that a bill being payable to A. or his order, he may indorse it to B., and B. to C., and so on toties quoties. Now the question is, whether the bill having been indorsed to Salomonson & Co., we can consider it otherwise than as an indorsement by name. I think not, and if so, a third party cannot derive a title to sue in his own name without an indorsement from them. It appears to me, on looking at the new rules, that the plaintiff has not followed the suggestion there given, for, all the indorsements are there set out. At all events, he has left the matter quite equivocal. The plaintiff has no right to leave it so, and call on the other party to state some fact to take away his right of suing.

PARK, J.—In the form given by the new rules the transfer is always stated to be by indorsement, and I cannot see why the count should vary merely because there is something behind which will prevent one party from suing in the name of another.

VAUGHAN, J.—I am of the same opinion. I do not think the object of the rules was to alter the law as regards bills of exchange. The simple question here is, whether this is a blank, or a special or restrictive indorsement. On reading the declaration, it certainly appears to me to be a special indorsement; but if it is equivocal, the plaintiff is bound to explain it. I think, therefore, the plaintiff fails in shewing his title through Salomonson & Co.

(a) Burr. 1224.

COLTMAN, J.—The question turns upon what is the meaning of the allegation that Fraser indorsed the bill to Salomonson & Co. That may be that Fraser wrote his name only, or that he indorsed it payable to the order of Salomonson & Co. It seems rather to point to a special indorsement; but at any rate I cannot agree that it is any thing else but equivocal. Then it stands undecided whether the indorsement was in such a position as that the bill would pass by delivery. If the Court had gone on to say that it was indorsed to the plaintiff, then the title would have been sufficient to enable him to sue, for whether it was a simple or a special indorsement it would still shew a good title. The nature of the indorsement, however, being equivocal, it does not shew such a title as would pass by delivery, and the plaintiff having alleged no title, cannot proceed.

Judgment for the defendant.

BROGGREF v. HAWKE.

JAMES had obtained a rule to shew cause why the prothonotary should not be directed to review his taxation of costs, and proceed to tax them on the usual scale, under Directions to Taxing Officers, H. T. 4 Will. 4 (a), the sum recovered being under 20*l*. The action was brought to recover 119*l*., and on the case coming on for trial before Chief Justice *Tindal*, a verdict was taken for the full amount of damages mentioned in the declaration, subject to a reference. The arbitrator, by his award, reduced the amount of damages to 8*l*. 5*s*., and an application was made to him to grant his certificate. He, however, refused, as he conceived he had no power, the cause not having been tried, and the plaintiff was therefore driven to apply to the

A cause being partly heard before a Judge, and a verdict taken for 119*l*., subject to the award of an arbitrator, and the verdict being subsequently reduced by the award below 20*l*., the Judge may grant his certificate that it was a proper cause to be tried before a Judge.

(a) Ante, Vol. 2, p. 486.

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Court. The prothonotary had objected to tax the costs in any way except in the ordinary course. The usual term that the arbitrator should have the power to certify had been omitted in the order of reference.

Ellis shewed cause.—The form of the rule was, that the prothonotary should review his taxation. There had been no taxation, but the prothonotary had not taxed the bill. There was no certificate that the cause was fit to be tried at Nisi Prius.

Wilde, Serjt., and *James*, in support of the rule.—The prothonotary had, in fact, gone through the bill, although he did not sign it, with a view to the parties coming before the Court. *Nokes v. Fraser* (a) was an authority to shew that the cause need not be heard throughout by the judge in order to enable him to certify, and *Ivey v. Young* (b) decided that the certificate might be given at any time. The Chief Justice, therefore, might certify now.

TINDAL, C. J.—I will certify.

Rule accordingly.

(a) Ante, Vol. 3, p. 339.

(b) Ante, Vol. 5, p. 450.

PERCIVAL v. CONNELL.

Semble, that the proper means of taking advantage of an error in the recital of the date of the writ of summons in the writ of trial, is to apply to the Court to amend the record at the cost of the plaintiff.

JAMES shewed cause against a rule obtained by *Thomas*, which called on the plaintiff to shew cause why the writ of trial, the finding of the jury, and all subsequent proceedings in this action, should not be set aside for irregularity, with costs. The irregularity was the mis-recital of the writ of summons in the writ of trial, the date of it being described as the 6th July, instead of the 22nd June, 1836. It was urged that this was an objection which should have been taken before. The trial took place on

Tuesday, 23rd May, before the under-sheriff, and application was made to the Court on the following Saturday, but the defendant heard nothing of it until the next Tuesday, when, at nine o'clock, he was served with the present rule, being at the time quite ready to tax the costs. *James* cited the case of *Whipple v. Manley* (a), where it was held that the record was conclusive evidence of the facts stated in it; and if a wrong date had been inserted, the proper course was to apply to the Court to amend the record at the cost of the plaintiff's attorney. The form of the writ of trial was given in the rule of H. T. 4 Will. 4 (b).

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Thomas said that he had moved the rule on the authority of *White v. Farrar* (c), in which the mis-statement of the date of the writ of summons in the writ of trial, was held to vitiate all the subsequent proceedings, and a verdict obtained by the plaintiff was set aside.

TINDAL, C. J.—It is a question whether this is a real defect. There is a distinction between this case and that of *White v. Farrar*. There, the defendant did not appear. We will suspend this rule, in order to give the plaintiff an opportunity of making a motion to amend the record, on payment of costs.

Rule accordingly.

(a) Ante, Vol. 5, p. 100.

(b) Ante, Vol. 2, p. 330.

(c) 2 M. & W. 288.

1837.

HUNTER v. WHITFIELD.

Where the defendant has been resident abroad for four years at the time of his being outlawed, and it is only sworn, in support of an application to reverse his outlawry *without costs*, that the plaintiff knew of his being abroad, and that a person in London received an annuity for him, and who could have given information respecting him, the Court will reverse the outlawry only on the usual terms.

W. H. WATSON had obtained a rule nisi for the reversal of the outlawry of the defendant without costs. The affidavit on which the rule had been obtained stated, that the defendant had been residing in Calais since 1832, and that since he had been living there, the plaintiff had obtained from him a statement of accounts, which having turned out to be incorrect, proceedings were taken against him and prosecuted to outlawry. The proceedings were commenced in January, and were completed on the 10th May, 1836. The defendant swore that he was not aware that proceedings had been taken until his return to England in the present year. It was sworn besides, that the plaintiff was aware of his living abroad, and the same fact was known also to Mr. Murray, who lived in Chancery Lane, and from whom the plaintiff might have obtained any particulars respecting him; and that gentleman was in the receipt of an annuity for him. The case of *Pigou v. Drummond* (a) was relied on.

Crowder shewed cause against the rule, and contended that there were no sufficient grounds shewn for the reversal of the outlawry without costs. The usual ground for making such an application was that harassing or oppressive conduct had been adopted on the part of the plaintiff. Here, there was no suggestion of anything of the kind, and the plaintiff besides swore that he had not been acquainted with the defendant's address for three years, and that he believed he had employed some other person than Murray as an agent.

TINDAL, C. J.—The general rule is, where a party applies to set aside an outlawry he pays costs, and if not he

(a) 1 Bing. N. C. 354.

must shew a case of oppression. How could the plaintiff proceed unless in the manner he has?

1887.

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v.
WHITFIELD.

W. H. Watson urged that some steps should have been taken to obtain an appearance for the defendant. The fact of the defendant's living abroad was admitted to be known to the plaintiff. The case of *Pigou v. Drummond* was parallel, and there, the Court made the plaintiff pay costs. The application here, however, was not that the plaintiff should pay costs, but that the outlawry should be set aside without costs.

TINDAL, C. J.—We cannot make any distinction between this case and those within the general rule. The rule must be absolute, but on the usual terms, bail to be put in in the alternative.

Rule absolute accordingly.

FINLEYSON v. M'KENZIE.

KELLY shewed cause against a rule nisi obtained by *Wilde*, Serjt., for entering judgment non obstante veredicto, or for a new trial, on the ground that the plea was no answer to the action beyond the sum paid into Court. It was an action of debt on a bill of exchange at three months' date for 78*l.* 13*s.* 6*d.* The defendant pleaded that he had paid 5*l.* 3*s.* 6*d.* into Court, in the form given by 17 Reg. Gen. H. T. 4 Will. 4, (Pleading Rules), and that he was not indebted to the plaintiff to a greater amount than that sum. The plaintiff replied, taking issue on the allegation that no more than the sum of 5*l.* 3*s.* 6*d.* was due. The jury found for the defendant. The ground

In debt against the acceptor of a bill of exchange, defendant pleaded payment into Court of a certain sum, and that he was not indebted beyond that amount, pursuant to the form given by 17 Reg. Gen. H. T. 4 Will. 4, (Pleading Rules); the plaintiff took issue on the allegation that no more was due;

the defendant had a verdict:—*Held*, that, although the plea might have been bad on special demurrer, as contrary to the rules of H. T. 4 Will. 4, with respect to such actions, yet that the plaintiff, having taken issue on the amount really due, he could not avail himself of the objection non obstante veredicto.

1837.

FINLEYSON
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of the objection to the plea was, that although by rule 2, under the head of "covenant and debt" among the rules in question, the plea of "nil debet" was totally abolished in all cases, and by rule 4 under the same head, it was directed that in actions on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession or avoidance, the defendant had in fact pleaded that he was never indebted to the plaintiff beyond the sum admitted in the plea. *Kelly* submitted, that as he had followed the form of payment into Court given by the rules in question (a), and there was no limitation as to the cases in which that form should be applied, nothing prevented its adoption by the defendant in this case. The form given contemplated the application of this plea to the action of debt. As the defendant in paying money into Court was compelled to adopt this form of plea, if he desired to dispute any liability beyond the sum paid into Court, there was no ground for objecting to its adoption.

Wilde, Serjt., in support of the rule, contended that by the form of plea which the defendant had adopted, he had in fact produced that mischief which it was the object of the rules in question to prevent. The plea admitted the drawing and accepting the bill, which *primâ facie* imported a sufficient consideration. He could not therefore be allowed, under his plea, to impeach the allegations in the declaration which he had admitted. If he were allowed to do this, the plaintiff might be taken by surprise with respect to the nature of the defence on which he intended to rely.

TINDAL, C. J.—This plea upon special demurrer might have been bad, because, except as to the 5*l.* 3*s.* 6*d.*, it is a

(b) Ante, Vol. 2, p. 320.

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plea of the general issue, which the new rules have in such a case abolished. The plaintiff, however, has taken issue on the allegation, that no more than the sum paid into Court was due. On this issue he has proceeded to trial. Now, in *Rawlins & Another v. Danvers* (a), it was held, that if to debt by the sheriff on a bail bond, the defendant pleads nil debet, and the plaintiff does not demur, but takes issue on it, it lets the defendant into any defence which he can prove. That case is like the present. I am therefore of opinion that the present rule ought to be discharged.

PARK, J., VAUGHAN, J., and COLTMAN, J., concurred.

Rule discharged.

(a) 5 Esp. 38.

CROFT v. MILLER.

BOMPAS, Serjt., shewed cause against a rule nisi obtained by *Wilde*, Serjt., for reviewing the prothonotary's taxation, on the ground that he had improperly disallowed the plaintiff's full costs on a writ of inquiry. It was an action of covenant for unliquidated damages; the defendant had suffered judgment by default, and the jury had assessed the damages at a sum not exceeding 20*l*. The prothonotary taxed the plaintiff's costs on the reduced scale provided by the Directions to Taxing Officers (a). This mode of taxation, it was now contended, was the proper one, and the cases of *Hooppell v. Leigh* (b), and *Savage v. Lipscome* (c), were cited.

A writ of inquiry in an action of covenant for unliquidated damages is within the Directions to Taxing Officers of H. T. 4 Will. 4, prescribing a reduced scale of taxation.

(a) Ante, Vol. 2, p. 485.

(b) Ante, Vol. 5, p. 40.

(c) Ibid. p. 385.

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MILLER.

Wilde, Serjt., contended that the directions in question did not apply to writs of inquiry, in actions of covenant for unliquidated damages. The 3 & 4 Will. 4, c. 42, s. 17, which provided the writ of trial, did not apply to actions for unliquidated damages. Although the action of covenant would be comprised within the words "any action" in the statute, and "covenant" was mentioned in the rule, the intention of the Courts could not have been, that in an action for unliquidated damages, where many difficult questions might arise, the inferior scale of costs only should be allowed.

Cur. adv. vult.

PER CURIAM.—We have consulted the other Judges, and we are of opinion that the present rule must be made absolute.

Rule absolute.

COURT OF EXCHEQUER.

Michaelmas Term,

IN THE FIRST YEAR OF THE REIGN OF VICTORIA.

CHEVERS v. PARKINGTON.

1837.

ASSUMPSIT by indorsee against drawer of a bill of exchange. The first count stated the making of the bill, the indorsement to the defendant, and that the acceptor did not pay the bill, although the same was presented to him on the day when it became due; of which the defendant had notice. Then followed a count on an account stated, and "that the defendant, in consideration of the premises respectively, then promised to pay the last-mentioned several monies on request: yet the defendant had disregarded his promise, and had not paid the same or any part thereof." Special demurrer to the first count, assigning for cause that no promise to pay the bill was alleged in the declaration.

In an action by indorsee against drawer of a bill of exchange, the declaration contained a count on the bill and on an account stated, with one promise to pay the last-mentioned several monies on request. The defendant having specially demurred on the ground that there was no promise to the count on the bill, the Court set aside the demurrer as frivolous.

R. V. Richards having obtained a rule to set aside the demurrer as frivolous,

Wightman shewed cause.—A demurrer cannot be considered as frivolous, if it raises a fair point for argument. *Henry v. Burbidge* (a) decided that if a declaration by indorsee against the acceptor of a bill do not allege a promise to pay, it is bad on special demurrer. There, the promise alleged was the same as in the present case,

(a) 2 Hodges, 16; S. C. ante, Vol. 5, p. 484.

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though there the declaration also contained a count for goods sold. This would be an inconvenient mode of taking the opinion of the Court upon a matter specially demurred to.

PARKE, J.—If there was the least ground for argument, you should have the benefit of it; but as the declaration contains but one sum besides the amount of the bill, the promise in terms applies to both counts. The rule must be absolute.

Rule absolute.

—◆—
 AITMAN v. CONWAY.

It is not irregular to enter a rule to plead before service of notice of declaration, provided the notice of declaration be served on the same day.

ON the 26th October, before three o'clock in the afternoon, the plaintiff entered his rule to plead, and at six o'clock in the evening of the same day served the defendant with a notice of declaration. On the 31st October, the plaintiff signed judgment for want of a plea, and on the 1st November levied under a writ of execution. On the 4th November a summons to set aside the judgment and execution was taken out before *Bolland, B.*, at chambers, returnable on the 6th, the 5th being Sunday. The learned judge referred it to Master Walker, who certified that the rule to plead could not be entered until after declaration filed and notice given. No order having been made by the learned Judge,

Chandless now made a similar motion, and relied on *Bennett v. Smith (a)*, in which it was held that a notice of declaration must be served previously to filing a rule to plead.

R. V. Richards shewed cause, and objected that the

(a) Ante, Vol. 5, p. 353.

application was too late. The case fell within the rule laid down in *Hinton v. Stevens* (a), where it was held that an objection to a notice of declaration on the ground of variance from the writ must be taken within four days from the time of serving the notice, and that an intermediate Sunday counts as one of those days.

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PARKE, B.—There the objection was in the nature of a plea in abatement for a misnomer. We think this application in time.

Richards.—Then, as to the other point, there is no proof the rule to plead was entered before the notice of declaration was served. It is true a præcipe was given before the office closed at three o'clock; but the rule may not have been actually entered until long afterwards. [*Parke, B.*—The officer says the instruction to enter the rule is tantamount to entering it. In *Tidd's Practice* (b) it is said, that a rule to plead may be entered on a præcipe with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, at any time after the delivery or filing notice of the declaration.] It appears from inquiry at the Masters' Office in the King's Bench that the practice has always been to enter the rule to plead on the same day that the notice of declaration is served. If it were not so, the consequence would be, that the defendant would have an extension of the time within which he is to plead. *Bennett v. Smith* does not apply to the present case. There, it appeared that the defendant lived at Liverpool, and consequently could not receive the notice of declaration until the day after the rule to plead was entered.

LORD ABINGER, C. B., stated that they had sent to inquire the practice of the Court of King's Bench, and the

(b) *Ante*, Vol. 4, p. 283.

(c) Vol. 1, p. 474, ed. 9.

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officers reported that they considered the judgment in the present case regular. It was the constant practice there to enter the rule to plead on the same day the notice of declaration was given.

PARKE, B.—If the two acts be done on the same day, the Court will not inquire at what time of the day they are done. This case is distinguishable from *Bennett v. Smith*, for there, the rule to plead must have been entered the day before the defendant received any notice of declaration.

ALDERSON, B.—It is better to adhere to the practice. If two or three things are to be done on the same day, the Court will presume that to have been done first which ought to have been so done.

Rule discharged, without costs.

LEWIS v. ALCOCK, Esq.

In an action for a false return, the declaration bore date 13th July, 1837, Victoria having then acceded to the throne, and alleged the recovery of a judgment in the K. B. in the 7th year of the reign of the late king, as appeared by the record "still remaining in the said Court of our said lord the king, before the king himself." On motion for judgment on production of the record:—*Held*, no variance.

THIS was an action against the sheriff of Surrey for a false return to a writ of fieri facias. The declaration was dated the 13th July, 1837, and commenced by stating that "the plaintiff, in the seventh year of the reign of our Lord the late King, in the Court of our said Lord the late King, before the King himself at Westminster, by the consideration and judgment of the same Court, recovered against one H. Gompertz, as well a certain debt of 400*l.* which was adjudged to the plaintiff, as well on the occasion of the detaining of a certain debt due and owing from the said H. G. to the plaintiff, as also 65*l.* which in and by the same Court was adjudged to the plaintiff, and with his assent, for his damages by him sustained, whereof the said H. G. was convicted, *as by the record and pro-*

ceedings thereof still remaining in the said Court of our said Lord the King, before the King himself at Westminster aforesaid, will more fully and at large appear." The defendant pleaded, "that there is not any such record of the said supposed recovery in the declaration mentioned remaining in the said Court of our said Lord the late King before the King himself," *modo et formâ*. Replication, "that there is such a record of said recovery remaining in the said Court of our said Lord the late King, before the King himself, as he, the plaintiff, hath above in his said declaration in that behalf alleged."

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—
LEWIS
v.
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Petersdorff having moved on the part of the plaintiff for judgment on production of the record,

Dowling prayed for judgment for the defendant, on the ground that there was no such record as that alleged in the declaration. The declaration referred to a record still remaining in the Court of the late King, whereas it appeared, from the date of the declaration, that it was delivered in the reign of the present Queen. The record, when produced, would not verify the replication. The averment should have been that the record was remaining in the Court of our Lady the Queen.

ALDERSON, B.—The only question is, whether there is such a record as that alleged in the declaration, and I am of opinion that there is no variance. I will however see what the rest of the Court think.

In the course of the morning, his Lordship stated that he had consulted the other Judges of the Court, and they coincided with him in opinion.

Judgment for the plaintiff.

1837.

TAYLOR v. MURRAY.

A judgment on demurrer is not within the rule of the Exchequer, which requires a copy of the bill of costs and affidavit of increase to be delivered to the opposite party at the time of service of notice of taxation.

An omission to comply with the above rule is no ground of setting aside the judgment and execution, but only of reviewing the taxation of costs.

THE plaintiff had obtained judgment on demurrer, and had given due notice of taxation of costs, but had neglected to deliver a bill of costs as required by the rule of this Court of M. T. 1 Will. 4.

Miller obtained a rule to shew cause why the taxation of costs, final judgment, and execution, should not be set aside for irregularity. He referred to *Wilson v. Parkins* (a), in which it was held that the rule was imperative unless waived by the opposite party.

Humfrey shewed cause.—A judgment on demurrer is not within the terms of the rule, which requires “That one day’s notice of the time of taxing costs upon *rules, orders, town postea*s, and *inquisitions*, and a copy of the bill of costs and affidavit to increase (if any), shall be given and delivered by the attorney or attornies of the party or parties, whose costs are to be taxed, to the attorney of the other party or parties in the same action, at the time of service of such notice; and that in the cases of *postea*s and *inquisitions* in country causes the notice shall be given two days, and a copy and affidavit delivered two days before such taxation.” The present taxation is neither on a rule, order, *postea*, or *inquisition*. *Wilson v. Parkins* does not apply, as that was the case of judgment on a *postea*.

Miller, contra.—The form of the rule for judgment is, “Upon hearing counsel for the plaintiff, and no cause being shewn to the contrary, it is *ordered* that judgment be entered for the plaintiff in the action.” This case, if not within

(a) Ante, Vol. 5, p. 461.

the precise words, falls within the meaning and spirit of the rule.

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LORD ABINGER, C. B.—This is clearly not an order within the meaning of the rule; and if it were, it is no ground for setting aside the judgment. You may go again before the Master and see if the costs are excessive.

PARKE, B.—The omission to comply with the rule is no reason for setting aside the judgment and execution, but the costs may be re-taxed afterwards.

Rule discharged, with liberty to go again before the Master.

RATHBONE v. FOWLER.

HUMFREY opposed an application made by *Heaton*, for discharging a defendant out of custody, under the 48 Geo. 3, c. 123. The original debt was under 20*l.*, but the defendant had given a cognovit for the debt and costs, amounting to 55*l.* In *Robinson v. Sundell* (a) and — v. *White* (b), it was held that a defendant who had given a warrant of attorney for debt and costs to an amount exceeding 20*l.*, though the original debt was less, was not entitled to his discharge under the 48 Geo. 3, c. 123. The words of the act were, "All persons in execution upon any judgment for any debt or damages not exceeding the sum of 20*l.*, exclusive of costs, &c." which means the costs in that action. It is difficult to distinguish between a warrant of attorney and a cognovit.

A defendant who has given a cognovit for debt and costs exceeding 20*l.*, is entitled to his discharge under the 48 Geo. 3, c. 123, if the original were under 20*l.*

PARKE, B.—A warrant of attorney is to confess a judgment for debt and costs in another suit; but where a party

(a) 6 Moore, 287.

(b) Ante, Vol. 1, p. 19.

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being sued gives a cognovit, it is the costs and debt of that suit, and then the costs are within the meaning of the act.

The rest of the Court concurred.

Rule absolute.

*Ad. Yates v. Palmer. 6. D. L. 203.
 (11). See Pearce v. Thew. 2. D. L. Exch. 381.*

ROBERTS v. HUMBY.

Reported 3. M. & M. 20.

The Bath Court of Requests cannot award compensation for loss of time in attending the court of a revising barrister. *Semble*, though a want of jurisdiction do not appear on the face of the proceeding, a prohibition may be awarded after sentence and execution, provided the party has not acquiesced in the jurisdiction of the inferior court.

KELLY had obtained a rule to shew cause why a writ of prohibition should not issue, directed to the Commissioners of the Court of Requests for the city of Bath, on the ground that they had exceeded their jurisdiction. It appeared that, on the 7th October last, Roberts had summoned Humby for compensation for loss of time in attending the Court of the Revising Barristers. The case was heard before the Commissioners on the 11th, and adjourned until the 18th, when they adjudged Humby "to pay 10s. debt and 3s. costs."

The *Attorney-General* shewed cause.—First, the application is too late. The rule of law is, that in all cases a prohibition must be moved for before sentence, unless the want of jurisdiction appear on the face of the proceedings. The authorities are collected in *Ricketts v. Bodenham* (a), which was a motion for a prohibition to the Ecclesiastical Courts: there, the 53 Geo. 3, c. 127, which gave power to a justice to enforce the payment of a sum under 10*l.* due upon a church-rate, where neither the validity of the rate nor the liability of the party had been questioned, took away in such case the jurisdiction of the Ecclesiastical Court; and where a party not having been summoned before a justice was libelled in the Consistory Court for a sum which, on the face of the proceedings, was less than

(a) 4 Adol. & E. 433.

10*l*. due upon a church-rate, and sentence was given against him, the Court of King's Bench refused to grant a prohibition, upon the ground that the validity of the rate was questioned in the proceedings in the Ecclesiastical Court; and it afterwards appearing by more particular reference to the pleadings themselves that they did not disclose whether or not its validity was questioned, the Court also held that circumstance alone did not authorize it to issue a prohibition; and they seemed of opinion that they could only look to the proceedings in the Ecclesiastical Court, and not to affidavits, for the purpose of ascertaining whether the validity of the rate was then questioned. *In the Matter of Poe (a)*, which was an application for a prohibition to a court-martial, the Court in giving judgment recognised the doctrine that a prohibition cannot issue after sentence and execution in the court below. In the present case there is nothing on the face of the sentence which shews a want of jurisdiction. It adjudges that Humby shall pay a *debt* and *costs*. [*Alderson, B.*—There must necessarily be some time allowed after sentence. What is to prevent the inferior court from going on at the time the superior court is not sitting? Would you say that in such case a party is concluded by the sentence?] In Comyn's Digest, tit. Prohibition, the rule is laid down without any qualification. Secondly—This Court of Requests has jurisdiction. It is true that, in the case of *Soames v. Rawlings (b)*, it was held that the Westminster Court of Requests could not adjudicate upon a claim for compensation of a similar description; but the jurisdiction of that court is confined to cases of *debt*. Besides, the objections now taken were not then brought before the Court. The 16th section of the 45 Geo. 3, c. 67, (the Bath Court of Requests Act), enacts that it shall be lawful for the Commissioners "to decide and determine all disputes and differences between party

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(a) 5 B. & Adol. 681.

(b) 2 C. M. & R. 744.

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and party for any sum not exceeding 10*l.*, in all actions or causes of debt, whether such debt shall arise from any bond, bill, or specialty for payment of money only, or any promissory note, or inland bill of exchange, or for rent upon leases, articles, *minutes*, and in all causes of assumpsit and insimul computasset, and in all causes or actions of trover and conversion, and in all cases or returns founded on a quantum meruit, and in all causes and actions of trespass or detinue for goods and chattels taken or detained." The language of this section is sufficiently comprehensive, and the claim in question may be included either under the term *minute* or as a quantum meruit. Then the 22nd section enables a party having any claim not expressly prohibited by the act to apply to the clerk of the Court for a summons expressing the sum demanded, and stating the particulars of such demand, which is to be served upon the debtor; and upon proof of such summons having been duly served, the Commissioners are empowered to adjudicate upon such demand, and to pass final sentence or judgment thereon. And the 47th section makes the judgment final and conclusive between the parties to all intents and purposes whatsoever.

Kelly, in support of the rule, was stopped by the Court.

LORD ABINGER, C. B.—The case has been very ingeniously argued, and all has been said which could be urged against the prohibition issuing; but the rule must be absolute. With respect to the first point, the case of *Ricketts v. Bodenham* does not apply: that arose upon a question in the Ecclesiastical Courts, and those courts must be presumed to have a jurisdiction unless the contrary appears on the face of their proceedings. It is different however with an inferior court created by act of Parliament for a specific purpose; there, the jurisdiction must be strictly confined to that purpose, and nothing can be pre-

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sumed in favour of them, but the presumption is rather against them. In the present case there is clearly a want of jurisdiction, because the summons had no other foundation for a claim of *debt* than that the plaintiff attended before the revising barrister upon a notice given by the defendant. Now, the attendance of a party pursuant to a notice does not constitute a debt. There appears to me a want of jurisdiction on the face of the proceedings. Then comes the question whether the 45 Geo. 3, c. 67, extends the jurisdiction of the Court to cases of this nature. All acts of Parliament giving an inferior court jurisdiction are to be construed strictly, and the power of the Court cannot be extended by implication. It appears to me that this claim does not fall within any of the cases mentioned in the 10th section. What is meant by the term "minutes" I cannot say, but it certainly does not mean a claim for summoning a party before a revising barrister. Then it is said that by the 47th section the judgment of the inferior court is final. It is a well-known rule that the jurisdiction of the superior courts of law cannot be taken away but by express words. Now the only point mentioned in the 47th section is the writ of certiorari. It is not necessary to determine whether this Court can, in all cases, grant a prohibition *after* sentence, for here a want of jurisdiction appears upon the face of the proceedings.

PARKE, B.—I agree with my Lord Chief Baron, that the presumption of law is against the jurisdiction of an inferior court, but the ground of my decision is, that a want of jurisdiction appears upon the face of the sentence. If, indeed, it had not appeared, I should have doubted whether it was not open to the superior court to interfere where so short a time elapses between the summons and adjudication, and the party had not an opportunity of applying to the superior court. I concur in opinion with Lord *Mansfield*, who, in delivering judgment in *Buggin*

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v. Bennett (a), says, "If it appears upon the face of the proceedings that the court below have no jurisdiction, a prohibition may be issued at any time, either before or after sentence, because all is a nullity,—it is *coram non judice*. But where it does not appear upon the face of the proceedings, if the defendant below will lie by and suffer that court to go on, under an apparent jurisdiction, (as upon a contract made at sea), it would be unreasonable that this party, who when defendant below has thus lain by, and concealed from the court below a collateral matter, should come hither after sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain a prohibition upon it, after all this acquiescence in the jurisdiction of the Court below." That case was decided upon the ground that the party had acquiesced in the decision of the inferior court; but if the question arose here, I should wish to take time before I established so unreasonable a rule that a party is concluded by the sentence of an inferior court when he had no opportunity of coming to the superior court to prevent it. As to the matter in dispute here, there is no question that the Court of Requests had no jurisdiction.

BOLLAND, B.—I am of the same opinion.

ALDERSON, B.—It appears on the face of the proceedings that the inferior Court has exceeded its jurisdiction; but even if it did not so appear, there are strong reasons why this Court should interfere. Prohibition being a writ at common law may be granted at any time, even after execution; and the only exception is, that a want of jurisdiction not appearing upon the face of the proceedings, the Court will not put the writ in force when a party has voluntarily submitted to the inferior jurisdiction. In

(a) 4 Burr. 2037.

2 Institute, p. 602, it is said that prohibitions by law may be granted at any time to restrain a court to intermeddle with or execute any thing which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary. And the King's courts that may award prohibitions being informed, either by the parties themselves or by any stranger, that any court, temporal or ecclesiastical, doth hold plea of that (whereof they have not jurisdiction), may lawfully prohibit the same as well after judgment and execution as before."

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Rule absolute.

BOOTH v. Lady HYDE PARKER.

ON the 28th October the defendant gave a cognovit, by which she confessed the action, and that "the plaintiff had sustained damage to the amount of 57*l.*," but no judgment was to be entered up unless default should be made in payment of the debt and interest, together with costs, on the 9th of November; and in case default should be made in payment of the debt and interest, together with costs, on the said 9th of November, the plaintiff was to be at liberty to enter up judgment for the same. On the 10th November, the debt not being paid, the plaintiff signed judgment without having taxed the costs, or made any demand of the debt.

Where a cognovit is given, with liberty, in case of default in payment of the debt and costs, to enter up judgment for *debt and costs*, it is irregular to sign judgment before the costs are taxed, unless the plaintiff means to waive his right to costs, in which case he should give the defendant notice of such intention.

Barstow having obtained a rule to set aside the judgment for irregularity,

Kelly shewed cause.—All that has been done is the mere act of making an entry upon the judgment paper. That judgment was to be signed on a certain day. The practice has always been first to sign judgment, and then to tax the costs upon that judgment. If this case be held an

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irregularity, a party could not, after the day of payment has passed, sign judgment and issue execution for the debt alone. [*Parke, B.*—If he means to waive the costs, he has only to say so: here the question is, whether the defendant is not justified in waiting until she knows the amount of costs. *Alderson, B.*—Has not the defendant contracted to pay the debt and costs together, and has not the plaintiff contracted that he will not require payment of the debt without costs?] Then this inconvenience would follow,—that two taxations would be necessary, one to ascertain the amount of debt and costs, and another to ascertain the costs of the judgment and execution. [*Alderson, B.*—That would be harder for a party making default, but beneficial to a party who paid; the question is, which of the two we ought to favour.] It might be doubtful whether there could be two taxations upon such a judgment. [*Alderson, B.*—How can a party be said to have made default, when you do not give him the means of performing his duty?] If the defendant were insolvent, it would be useless to go to the expense of a taxation. [*Parke, B.*—In that case you should give him notice; this instrument contemplates but one proceeding.] The practice has always been to commence entering the judgment, and when the costs are taxed, judgment is signed for the whole amount. [*Parke, B.*—The Master cannot certify any certain practice in that respect; he says it is common for parties to come with the *cognovit* to tax the costs upon.] Then there must be another taxation to get the costs of the judgment. [*Parke, B.*—Yes; one taxation in order to let the defendant know what he is to pay, and another upon the final judgment.] In this case final judgment has not been signed, so that the extent of the objection would be that the plaintiff is not entitled to the costs of beginning to sign judgment, because he has not afforded the defendant an opportunity of paying the debt.

Barstow, in support of the rule.—Where a cognovit is given with a stay of judgment until default in payment of debt and costs, the plaintiff should tax the costs before he signs judgment. From inquiry of the officers of the Queen's Bench, that appears to be the common practice in that Court. In *Wilson v. Northern* (a), the defendant had given a cognovit payable on a certain day, and if not paid, the costs were to be taxed and judgment signed, and Lord *Abinger*, C. B. says, "as the agreement was to tax the costs and sign judgment, the judgment ought not to have been signed before the costs were taxed."

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PARKE, B.—The rule must be absolute to set aside the judgment. With respect to the observation that the mere entry on the judgment paper is not a signing of judgment, it is true that judgment is not completely signed, but by the terms of this cognovit it is irregular to commence signing it. The question then resolves itself into the terms of the cognovit; does it mean that there is to be a tender of the debt, and another tender of the costs? Or rather, is not this the meaning of it,—that there is to be but one tender by the defendant, viz. of the amount of the debt and taxed costs? In order to enable the defendant to make that one tender, and to obviate the inconvenience of two separate tenders, it is necessary for the plaintiff to go through the form of ascertaining the amount of costs, as that is a fact which lies within his own knowledge. If the plaintiff intended to abandon his claim to costs, he should have given notice to the defendant, and then, upon nonpayment of the original debt, the cognovit, would have been forfeited. By the terms of this cognovit there should be but one tender. If it be intended to make the nonpayment of the debt only a forfeiture of the cognovit, the parties should so stipulate.

(a) Ante, Vol. 4, p. 212.

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ALDERSON, B.—I agree with the Court in their reasoning in the case of *Wilson v. Northern*. It is true that in that case there were circumstances which might have induced a decision the other way; but it cannot therefore be considered as no authority when the reasons given by the judges are precisely in point on the present occasion. But independently of that, the plain sense is, that judgment ought not to be signed until default in payment of the aggregate sum. If that sum has never been ascertained, how can the party make a default in not having paid it? If the plaintiff means to waive the costs, he should tell the defendant so.

GURNEY, B., concurred.

Rule absolute, with costs.

SMART v. JOHNSON.

If no date be stated in the copy of the *capias* served on the defendant, the arrest is irregular.

Semble, that where a party seeks to be discharged from an arrest, on the ground that he is entitled to a peerage, then the subject of dispute in the House of Lords, the application should be made to that tribunal, if sitting.—Per Lord Abinger, C. B.

R. V. RICHARDS had obtained a rule to shew cause why the bail-bond given by the defendant should not be delivered up to be cancelled. The application was made on two grounds: first, that the defendant was a peer of Scotland; secondly, that the copy of the writ served on the defendant contained no date at the teste. In support of the first ground there was an affidavit of the defendant, that, in the year 1830, he sat and voted as Earl of Anandale at the election of Scottish representative peers, and that no protest was entered against his vote, but that, on the contrary, he was received and congratulated by his brother peers: that his letters sent by the general post went free in Scotland.

Platt shewed cause upon affidavits, which stated that the defendant was not a peer of Scotland, and that there were no less than fifteen claimants for the Earldom of

Annandale, which claims were still pending in the House of Lords: that inquiry had been made at the Herald's office, and that he was not registered there as a Scotch peer. [*Alderson, B.*—As there is an affidavit that he voted at the election of Scotch peers, it is within the case of *Digby v. The Earl of Stirling* (a).] Where the question of privilege is doubtful, the Court will not discharge the defendant on motion, but will leave him to his writ of privilege: *Luntley v. Battine* (b). [Lord Abinger, C.B.—The case of Lord Stirling was decided when the House of Lords was not sitting; but, as it is sitting now, the application should be made there.] Then, as to the omission of the date in the copy of the writ, that does not necessarily invalidate the arrest, though perhaps it might be a good objection to serviceable process.

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Richards, in support of the rule, contended that the present case was stronger than that of *Digby v. The Earl of Stirling*, since there it appeared the defendant's vote had been protested against.

PARKE, B.—If the copy of the writ served on the defendant is irregular, the arrest is bad. The rule must be absolute on that ground.

ALDERSON, B.—Then we need not decide the other point.

Rule absolute with costs—No action
to be brought.

(a) Ante, Vol. 1, p. 248.

(b) 2 B. & Ald. 234.

1837.

LUCE v. IRVIN.

Where an affidavit to hold to bail stated the defendant to be indebted upon a promissory note drawn by him, payable to T. F., and by T. F. indorsed to the plaintiff; and it appeared by the declaration that there was an intermediate indorser:—*Held*, not to be such a variance as to discharge the bail.

HUMFREY moved to enter an exoneretur on the bail piece, on the ground of a variance between the affidavit to hold to bail and the declaration. The affidavit stated the defendant to be indebted to deponent in 50*l.* for principal money upon a promissory note, drawn by the defendant, payable to T. Flaery, and by T. Flaery indorsed to the deponent. The declaration stated an indorsement by T. Flaery to W. Hare, and that W. Hare indorsed to deponent. In *Wilks v. Adcock* (a), the affidavit to hold to bail stated that the debt arose on a *bill of exchange or order*, but the instrument declared upon appearing not to be a bill of exchange, the Court ordered the bail-bond to be delivered up to be cancelled. Then the bail have been misled, inasmuch as they have entered into the engagement upon the faith of there being no transactions between Flaery and the plaintiff.

LORD ABINGER, C. B.—If the declaration in *Wilks v. Adcock* was improper, the Court were wrong in the first instance in deciding the affidavit to hold to bail to be good. The affidavit does not shew whether the cause of action arose on a bill of exchange or an order. Whenever there is a variance between the affidavit and declaration, the Court will undoubtedly discharge the bail, but here the declaration is not substantially different.

PARKE, B.—It is difficult to support the case of *Wilks v. Adcock*. Here, the declaration is substantially for the same cause of action as the affidavit to hold to bail.

Rule refused.

(a) 8 T. R. 27.

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HARRISON v. RIGBY.

COWLING moved to set aside a writ of *capias*, and to discharge the defendant out of custody, on the ground of a defect in the affidavit to hold to bail. The affidavit stated that Rigby was "indebted to this deponent in 20*l.* for principal money upon a bill of exchange *drawn and accepted* by Rigby for 20*l.*, payable to deponent at a certain day now past, and that the same remains due and unpaid." The objection was, that the affidavit did not state who was the drawer of the bill, or that the bill was drawn upon the defendant. The defendant might have accepted it though not originally drawn upon him.

An affidavit to hold to bail stated defendant to be indebted upon a bill of exchange *drawn and accepted* by him:—*Held*, sufficient.

PARKE, B.—I think there can be no mistake about it.

Rule refused.

LEWIS, Assignee, &c. v. PARKER.

THIS was an action of debt by the assignee of a bail bond. The declaration, after stating the issuing of the writ, the arrest, execution of bail-bond, &c. proceeded to allege, "that the sheriff, on &c., at the request of the plaintiff in the said suit, by an indorsement on the said writing obligatory, duly made and sealed with the seal of office of the said sheriff, assigned the said writing obligatory to the plaintiff, according to the form of the statute in such case made and provided." Special demurrer, assigning for cause that it did not appear in or by the said declaration that the said sheriff signed writing obligatory, by indorsing the same and attesting it under his hand, or the said sheriff assigned the said writing obligatory in the presence of two credible witnesses, as required by the statute.

In an action by the assignee of a bail-bond, it is not necessary to state that the assignment was under the hand of the sheriff, or in the presence of two credible witnesses, provided it be alleged to have been "according to the form of the statute," &c.

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Mansel, in support of the demurrer.—The authority to assign the bond is given by the 4th Anne, c. 16, s. 20, which enacts, “that if any person shall be arrested by any writ, &c. issuing out of any of her Majesty’s courts of record at Westminster, at the suit of any common person, and the sheriff or other officer taketh bail from such person against whom such writ is taken out, the sheriff or other officer, at the request and costs of the plaintiff in such action or suit, shall assign to the plaintiff in such action the bail-bond, or other security taken from such bail, by indorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses.” The power to assign the bond depending upon this act, it ought to appear, upon the face of the declaration, that the requisites of the statute have been strictly complied with. To the present form there are two objections, first, that the assignment is not stated to have been under the hand of the sheriff; and secondly, that it does not appear to have been in the presence of two witnesses. *Mifflin v. Morgan* (a) is not an authority in support of the declaration, since there, the objection was raised in error upon a judgment by nil dicit, and the court thought this a defect which would have been aided by verdict, and was therefore aided after judgment by nil dicit. *Lease v. Box* (b) only decided that it was not necessary to state the names of the witnesses, or to make profert of the assignment.

Humfrey, in support of the declaration.—*Dawes v. Papworth* (c) is precisely in point. There, the declaration alleged, “that the sheriff by a certain indorsement upon the bond assigned and set over the same to the plaintiff, according to the form of the statute in such case made and provided;” and the Court say, “We are all of opinion that there

(a) 2 Ld. Raym. 1564.

(b) 1 Wilson, 121.

(c) Willes, 408.

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was no weight in either of the objections; as to the first, we thought it the best way of declaring, though declarations sometimes are otherwise, because the plaintiff must prove, to shew that the assignment was according to the statute, that it was under the hand and seal of the sheriff." And in a note by Chief Justice *Willes* it is added, "The same point has been ruled on another part of this clause in the act. Though the statute requires the indorsement to be made by the sheriff *in the presence of two witnesses*, it is not necessary to set out their names in the declaration stating the assignment, or even to state that it was indorsed in the presence of two witnesses. *Robinson v. Taylor*, Fort. 366, *Lease v. Box*, 1 Will. 121, *Rollison v. Taylor*, Tr. 13 Geo. 1, s. 122. It is sufficient to state generally that the sheriff, at the request and costs of the plaintiff, assigned the bond to the plaintiff according to the form of the statute." In a declaration against the sheriff for an escape, it is enough to allege that the warrant directing the arrest was *duly indorsed for bail*, without adding "by virtue of an affidavit made and filed of record:" *Nightingale v. Wilcoxson* (a). That it is not necessary to state the names of the witnesses is evident from the case of *Robinson v. Taylor* (b), and it cannot be more important to state the assignment to have been under the hand of the sheriff (c).

LORD ABINGER, C. B.—It is sufficient to allege that the sheriff assigned the bond according to the form of the statute; because, at the trial the plaintiff must under that averment prove that the bond was assigned under the hand of the sheriff or in the presence of two witnesses.

PARKE, B.—I agree with the Chief Baron. If we were to hold it necessary to go into the minutiae of every thing

(a) 10 B. & C. 203.

(b) Fort. 366.

(c) See *Philips v. Barlow*, ante, Vol. 3, 181.

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the statute requires, there would then be demurrers to actions by the assignees of bankrupts and insolvents.

ALDERSON, B.—One reason given by the judges for determining the case of *Dawes v. Papworth*, applies equally to this case, and if we did not hold this averment sufficient, we should be overruling one ground, on which, that judgment is supported.

Judgment for the plaintiff.

VAUGHAN v. GOADBY.

The plaintiff arrested the defendant on an affidavit for money lent and advanced. The defendant afterwards obtained a Judge's order to arrest the plaintiff, and the latter, in order to get discharged, made an affidavit inconsistent with his claim for money lent: —*Held*, that this was no ground for cancelling the bail-bond.

JAMES had obtained a rule to shew cause why the bail-bond given by the defendant should not be delivered up to be cancelled on entering a common appearance. The plaintiff had arrested the defendant for 200*l.* upon an affidavit for money lent and advanced. Subsequently, the defendant applied to a Judge for leave to arrest the plaintiff, and obtained an order for that purpose. The plaintiff afterwards applied to be discharged out of custody, and in support of that application made an affidavit disclosing facts inconsistent with his claim for money lent. It appeared that the plaintiff and defendant had entered into an agreement by which the latter was to manufacture microscopes for the American markets, and the plaintiff was to supply him with money for that purpose. On the part of the defendant it was sworn that he had made microscopes to a much larger amount than 200*l.* which had in fact been given him by the plaintiff. The plaintiff by his affidavit admitted the contract, but denied that any microscopes had been delivered in pursuance thereof. It was sworn there was no other dealing between the parties.

Erle shewed cause, and contended, that where an affidavit of debt is good upon the face of it, the Court will

not allow the merits to be questioned upon counter affidavits. That principle was recognized in *Nixetich v. Bonacich* (a).

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James, contra, referred to *Chambers v. Bernasconi* (b), where an uncertificated bankrupt, in order to try the validity of his commission, held his assignee to bail in an action for money had and received, and the Court discharged him on filing common bail.

LORD ABINGER, C. B.—This is the first case I know of in which a party who has been held to bail upon a proper affidavit has sought to get discharged because certain facts are stated in another affidavit inconsistent with the affidavit upon which he has been arrested. If we were to allow this application, it would be a very dangerous precedent. Any defendant who had been arrested upon a proper affidavit might file a bill in Chancery, or get a rule nisi upon some collateral matter, and then find in the affidavit in answer something upon which he could apply for his discharge. If we were to establish such a precedent, there would be a motion every term to try the merits upon matter ex post facto.

PARKE, B.—If you take Vaughan's affidavit by itself, there appears a cause of action for money lent and advanced; but if taken in conjunction with the defendant's affidavit, there is no pretence for holding the latter to bail. That ground, however, is not sufficient to call upon us to interfere. I fully concur in what has fallen from my Lord Chief Baron.

BOLLAND, B., concurred.

Rule discharged, without costs.

(a) 5 B. & Al. 904.

(b) 6 Bing. 499.

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SIBONI v. KIRKMAN and Another, Executors of
J. KIRKMAN.

Where a replication traversed the facts contained in the plea, and concluded to the country, but without an "&c.," and no similiter was added:—*Held*, that the omission might be considered as a misprision of the clerk, and amendable after verdict, judgment, and writ of error brought.

MARTIN had obtained a rule to shew cause why the plaintiff should not be at liberty to amend the record, by adding (a) the similiter to the replication to the third plea. The action was brought upon an agreement, by which the defendant's testator was to allow the plaintiff, on the purchase of a piano, the sum of 40*l.* on account of a piano before delivered by the plaintiff. The third plea was accord and satisfaction by the delivery of another piano. The replication traversed the facts alleged in the plea, and concluded to the country, but without an "&c." No similiter was added. At the trial before *Parke*, B., at the sittings in Trinity Term, the jury found for the plaintiffs, and the defendant's counsel tendered a bill of exceptions to the summing-up of the learned Judge; and, amongst other causes, it was assigned as error that no issue was joined upon the third plea.

Kelly shewed cause.—There is no authority for this application after judgment. In *Cooper v. Spencer* (b), which was an action for assault and battery, the plaintiff replied de injuriâ to a plea of son assault, and took down the cause to trial without adding the similiter. A motion having been made in arrest of judgment, the Court were all of opinion that the objection was fatal. In *Sayer v. Pocock* (c), the application to amend was before judgment; and besides, in that case there was an &c., which the Court construed to mean every necessary thing that ought to be expressed, and therefore after verdict the similiter might be considered as included. In *Griffith v.*

(a) 1 M. & W. 418.

(b) 1 Str. 641.

(c) 1 Cowper, 407.

Crockford(a), the Court set aside the verdict, on account of the omission of the similiter. After error brought, the Court can only amend the record in respect of some misprision of the clerk: *Green v. Miller* (b). This is not an amendment within the statutes of jeofails, which apply to cases in which there is an issue joined, but imperfectly joined.

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Martin, in support of the rule.—*Cooper v. Spencer* has been overruled by *Harvey v. Peake* (c). From the report of *Griffith v. Crockford*, in 6 Moore, 51, it appears that the issue was delivered to the defendant, who returned it without adding the similiter to the conclusion of the plea, but merely inserted an &c.; the plaintiff's attorney afterwards sent it back to the defendant, who took out a summons to amend by adding it, which was refused unless he would accede to certain terms; these, the defendant refused to comply with, and carried down the issue, without adding it, although it was done in making up the record. But that case may be considered as overruled by *Stockdale v. Chapman* (d). In the books of practice (e) it is stated that the want of a similiter is aided after verdict by the 32 Hen. 8, c. 30. So also, in the note to the case of *Bennett v. Holbeck* (f): but the Court has power to allow this amendment under 8 Hen. 6, c. 12, s. 2, which enacts, "that the King's judges of the courts and places in which any record, process, word, plea, warrant of attorney, writ, panel, or return, which for the time shall be, shall have power to examine such records, process, words, pleas, warrants of attorney, writs, panels, or return, by them and their clerks, and to reform and amend (in affirmance of the judgments of such records and processes) all that which to them in their discretion seemeth to be the misprision of

(a) 3 B. & B. 1.

(b) 2 B. & Adol. 781.

(c) 3 Burr. 1793.

(d) 4 Adol. & E. 419.

(e) 2 Arch. 843; 2 Tidd, 924.

(f) 2 Wills. Saund. 319.

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the clerks, in such record, processes, word, plea, warrant of attorney, writ, panel, and return, except appeals, indictments of treason, and of felonies, &c., so that by such misprision of the clerk, no judgment shall be reversed nor annulled." In *Sayer v. Pocock* (a), Lord Mansfield allowed the amendment on three grounds; first, that it was an omission of the clerk; secondly, he says he will adopt the reasoning of Lord Coke, and construe "&c." to mean any necessary matter that ought to be expressed; and thirdly, by amending, the Court only make *that* right which the defendant himself understood to be so, by his going down to trial. [*Parke, B.*—The difficulty is to make this the misprision of the clerk.] It may be in copying the Nisi Prius record. [*Parke, B.*—You must shew some document or paper writing, which the clerk ought to have copied.] As the issue was not objected to, it must be taken to have been admitted to be right. Where the plaintiff added the similiter to a rejoinder, concluding with a verification, and took the record down to trial, and the defendant obtained a verdict, the Court refused a new trial, and allowed the record to be amended (b). In *Reeder v. Bloom* (c), the amendment was allowed. In *Wright qui tam v. Horton*, the similiter was added by mistake in the defendant's name instead of the plaintiff's, and the Court allowed an amendment; and Lord Ellenborough, C. J., observes, that on referring to the case of *Sayer v. Pocock*, he found that Lord Mansfield considered a similar omission as a misprision of the clerk.

PARKE, B.—The Court are inclined to allow the amendment. The statute authorizes us to amend in all cases of errors arising from the misprision of the clerks; and as there are two authorities for considering this as a misprision of the clerk, the Court will order an amendment upon that principle, upon payment of costs.

Rule accordingly.

(a) 1 Cowp. 407.

(b) 1 New Rep. 28.

(c) 2 Bingh. 384.

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DEBENHAM and Another, Surviving Partners, v. CHAMBERS.

ASSUMPSIT. The last count, which was in the form given by the rule of Trinity Term 1 Will. 4 (a), stated the defendant to be indebted to the plaintiffs, and one Machin, in his lifetime, now deceased, "for money found to be due from the defendant to the plaintiffs and the said Machin, on *an account then stated between them* : and the defendant afterwards, &c., in consideration of the premises, respectively promised the plaintiffs and the said Machin, in the lifetime of the said Machin, to pay them the said several monies on request ; yet the defendant hath disregarded his promises, and hath not paid any of the said monies." Special demurrer, assigning for cause that the count ought to have stated the defendant to be indebted on "an account stated and settled by and between them, or stated by them ;" and also that the breach was insufficiently alleged, inasmuch as it did not aver that the money was not paid to the plaintiffs since the death of Machin.

Platt, in support of the demurrer, referred to *Hooper v. Vestris* (b), in which an affidavit to hold to bail, stating a debt "for money found to be due to the deponent by the said E. L. Vestris, on an account stated between them," was held insufficient; *Coleridge, J.*, observing, that it was consistent with the statement contained in the affidavit, that no debt was really due. Here, it did not appear whether the account was stated between the partners themselves, or between them and the defendant. The words "between them" might mean the plaintiffs, or the plaintiffs and their deceased partner. The old form stated that the defendant accounted with the plaintiffs concerning money due from the defendant to

A count in assumpsit stated the defendant to be indebted to the plaintiffs and their deceased partner "for money found to be due on an account then stated between them;" and after laying the promise to the three, assigned as a breach that "the defendant had not paid:—*Held* sufficient on special demurrer.

Semble, that an affidavit to hold to bail, stating the defendant to be indebted to the plaintiff "for money found to be due on an account stated between them," is sufficient.

(a) Ante, Vol. 1, p. 113.

(b) Ante, Vol. 5, p. 710.

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the plaintiffs, and upon such accounting the defendant was found indebted. Besides, the breach was improperly alleged: it stated, "the defendant had not paid." Now the breach must be considered as referring to, and co-extensive with, the promise: the promise is, that the defendant would pay the two plaintiffs and Machin; therefore, it is consistent with this breach that there has been a payment to the two surviving partners, after the death of Machin.

Addison, in support of the declaration, was stopped by the Court.

Platt then prayed leave to amend.

PARKE, B.—If you choose to demur to a form propounded by the Judges in their rules, you must abide by the consequences. It is true that if the count were bad in point of law, the Judges could have no power to compel its adoption; but the consideration of their having framed it is a strong authority upon the question of its correctness. As to the words "between them," there is no difficulty in their construction: it means that the account was stated between the plaintiffs and their late partner on the one side, and the defendant on the other side. I also think the breach sufficient: the allegation is, that the defendant has not paid at all, either to one party or the other. The case of *Hooper v. Vestris* arose upon an affidavit to hold to bail, and I question whether more strictness is required in an affidavit than a declaration.

ALDERSON, B.—In *Hooper v. Vestris*, the learned judge appears to have overlooked the word "indebted" in the affidavit. How can it be consistent with the fact of there being no debt, when the deponent swears the defendant to be indebted (a).

Judgment for the plaintiffs.

(a) Ante, Vol. 5, p. 632.

1837.

WALLEN v. SMITH.

ASSUMPSIT to recover the sum of 50*l.* upon a special agreement. The declaration also contained counts for work and labour, money paid, and money due upon an account stated. The defendant paid two pounds into Court, and pleaded a set-off. The cause was referred to an arbitrator, without a verdict being taken; but it was agreed that the party in whose favour the award should be made should be at liberty to enter up judgment, as if a verdict had been obtained. The arbitrator found for the plaintiff to the amount of 10*l.* 10*s.*, in addition to the money paid into Court. Upon taxation the master allowed costs upon the scale of debts above 20*l.*

Assumpsit referred to arbitration without a verdict being taken, and the arbitrator awarded a sum less than 20*l.*: *Held*, that this was a sum "recovered" within the meaning of the "Directions to Taxing Officers," and that the costs were to be taxed upon the lower scale.

Platt having obtained a rule for the master to review his taxation,

Kelly shewed cause.—The directions are that (a) "in all actions of assumpsit, debt, or covenant, where the sum recovered or paid into Court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l.* (without costs), the plaintiff's costs shall be taxed according to the reduced scale." The rule cannot apply to a case like the present, when the matter is referred to arbitration, for the money is neither *recovered* nor taken out of Court. Under the 43 Geo. 3, c. 46, s. 3, it has been held, that if a defendant, arrested for a certain sum, pay a less sum into Court, which the plaintiff accepts as satisfaction, that is not a case within the statute: *Davey v. Renton* (b), *Rouveyroy v. Alefson* (c), *Butler v. Brown* (d). Or if the matter

(a) H. T. 4 W. 4, ante, Vol. 2,
p. 485.

(b) 4 D. & R. 187.

(c) 13 East, 90.

(d) 1 B. & B. 66.

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be referred to arbitration, and the arbitrator award the plaintiff a less sum than that for which he held the defendant to bail: *Keene v. Deeble* (a). So where defendant tendered a less sum than that for which he was arrested, but did not pay it into Court, and the arbitrator to whom the cause was referred awarded only the amount tendered, it was held the defendant was not entitled to costs (b). Here, the judgment has been upon an agreement between the parties. The word recovered, in the "Directions to Taxing Officers," must mean recovered by verdict, or judgment by default. That the finding of an arbitrator is not equivalent to a verdict is evident from the case of *Holder v. Raitt* (c), where the matter was referred to arbitration by a judge's order, which directed that the costs of the suit, reference, and award, should *abide the event in like manner as upon a verdict*; and the arbitrator having awarded a less sum than that for which the defendant had been arrested, the Court nevertheless held that they could not give the defendant costs under the 43 Geo. 3, c. 46. [*Parke, B.*—There should have been a further provision that the arbitrator should have the same power as the Court.]

Platt, in support of the rule, was stopped by the Court.

LORD ABINGER, C. B.—I am inclined to think that in the present case there is a recovery of less than twenty pounds, within the terms of the "Directions to Taxing Officers." It is a recovery by process and judgment. If the rule had contemplated no case except that of a recovery by verdict, I should have felt more difficulty; but it provides, that where a sum less than twenty pounds is

(a) 3 B. & C. 491.

(b) *Sherwood v. Tyler*, 3 Bing. 280.

(c) 2 Adol. & E. 445.

paid into Court, and accepted by the plaintiff in satisfaction, the taxation is to be upon the lower scale. The word "recovered" applies generally to all cases in which a party does not obtain more by his process than twenty pounds.

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PARKE, B.—I am of the same opinion. In cases of this kind there can be no hardship, because the parties when they refer may always provide that the costs shall be taxed upon the higher scale. These "Directions" have been held by the Court of Common Pleas to apply to judgments by default (*a*), and it seems to me this is clearly a recovery of less than twenty pounds, within the meaning of the rule.

ALDERSON, B.—In order to entitle a party to costs upon the larger scale, he must, since that rule, shew he has recovered more than twenty pounds.

Rule absolute.

(*a*) *Hooppell v. Leigh*, ante, Vol 5, p. 40.

KENYON v. WAKES.

ASSUMPSIT for work and labour, money paid, money lent, and for money due on an account stated. The defendant pleaded non-assumpsit, and two other pleas which were immaterial, but there was no plea of payment.

The particulars of the plaintiff's demand were as follows :—

In an action for wages, the particulars of demand admitted a payment on account. The plaintiff claimed for his service, at the rate of 15s. per week, but the jury

found that he was entitled to 7s. per week only, at which rate, deducting the sum admitted to be paid, there was nothing due. A verdict having been found for the defendant, the Court refused to disturb it, it not having been objected at the trial that the plaintiff was entitled to nominal damages, there being no plea of payment on the record.

Quære, whether a payment admitted by the particulars need be pleaded?

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To money paid by plaintiff for the defendant, and for money lent by plaintiff to defendant, at various times, from May, 1833, to September, 1836 - - -	£ 11 18 8½
To wages from April 22nd, to September 26th, 1833, at 15s. per week - -	16 17 6
To wages from October 1st, 1833, to October 22nd, 1836, at 15s. per week -	119 5 0
	<hr/>
	148 1 2½
Payments on account - - -	70 0 0
	<hr/>
	£ 78 1 2½
	<hr/>

At the trial before Lord *Abinger*, C. B., at the Sittings after last Hilary Term, the plaintiff proved his service to the defendant for the periods mentioned in the particulars, and claimed payment for it after the rate of 15s. per week. On the part of the defendant it was contended that he had contracted to pay the plaintiff at the rate of 7s. per week only, and that therefore nothing was due to the plaintiff, as he admitted in his particulars that 70l. had been paid to him on account. The plaintiff's counsel contended that the defendant could not make use of the particulars, there being no plea of payment on the record. Even if he was entitled to use them, they must be taken all together, in which case there would appear to be a balance in favour of the plaintiff. The learned Judge allowed the particulars to be given in evidence, and the jury found that the plaintiff was entitled to receive for his services at the rate of 7s. per week only, and thereupon gave a verdict for the defendant.

Humfrey having obtained a rule to set aside the verdict for a new trial,

Thesiger shewed cause.—It was unnecessary to plead

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payment of the 70%, as the plaintiff has given credit for that sum in his particulars. The object of the particular is to inform the defendant of the real nature of the plaintiff's claim, so that he may know what to plead; and a payment on account having been admitted, that sum must be taken as altogether struck out, and the plaintiff's demand confined to the balance. The decision in *Booth v. Howard* (a) does not affect the present case. There, the plaintiff declared for work and labour in endeavouring to let certain premises for the defendant; the particulars of demand contained two sets of items in respect of letting different premises, and the defendant paid a sum into court, upon which the issue raised was, whether the plaintiff had sustained damages beyond that sum, in respect of the causes of action mentioned in the declaration. The Court held that the particulars of demand were not to be considered as incorporated with the declaration, so as to constitute an admission by the plea of all the causes of action mentioned in the declaration, and they observed that the particulars were intended for the benefit and information of the defendant. Here, the particulars shew that the plaintiff seeks to recover a balance, which the jury have found does not exist.

Platt and Humfrey, in support of the rule.—Admitting that the particulars cannot be incorporated with the declaration, yet, as the defendant has omitted to plead payment, the plaintiff is at all events entitled to nominal damages. It was so decided last term by the Court of Common Pleas, in the case of *Ernest v. Brown* (b). That was an action of debt for work and labour, and goods sold and delivered. The plaintiff by his particular claimed 5*l.* for goods sold, admitting the receipt of 1*l.* 13*s.* on account. The defendant paid 3*l.* 7*s.* into Court, and pleaded nun-

(a) Ante, Vol. 5, p. 438.

(b) Ante, Vol. 5, p. 637.

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quam indebitatus beyond that sum. At the trial the plaintiff failed to establish his demand for work and labour; it was held that he was nevertheless entitled to a verdict for nominal damages: *Tindal*, C. J., observed, that giving the admission on the face of the particulars its fullest effect, it amounted to no more than evidence of payment of 1*l.* 13*s.*; it was no bar to the action. [*Parke*, B.—How can the plaintiff avoid the costs of a *nolle prosequi*, if he discontinue on a plea of payment, otherwise than by an admission in his particulars.] By inserting in his declaration the actual amount he seeks to recover, or by expressly admitting the sum paid on account, and alleging a promise to pay the residue. [Lord *Abinger*, C. B.—What would non-assumpsit go to in such a case?] The promise alleged, which is, to pay the balance. [*Parke*, B.—You would have to prove such a promise: from what time would the Statute of Limitation run? Lord *Abinger*, C. B.—You would make the declaration a special contract on an account stated.] Such a form is used by some pleaders.

LORD ABINGER, C. B.—As the objection was not taken at *Nisi Prius*, that the particulars could only be used in reduction of damages, and not in bar of the action, I think the verdict ought not to be disturbed. The particulars were put in to shew that the plaintiff limited his claim for wages to the balance which he alleged to be due. The jury have found that there was no balance.

PARKE, B.—I think the rule should be discharged, because the point, as to whether the plaintiff was not at all events entitled to nominal damages, was not raised at the trial. If that point had been taken, we must have considered the question, which must soon be determined, viz. whether a payment admitted by the particulars need be pleaded. Had it not been for the decision of the Court

of Common Pleas, in *Ernest v. Brown*, I should have had little or no doubt upon the subject. Before that case I entertained a strong opinion, and so expressed it in *Coates v. Stevens* (a), that such a payment need not be pleaded. I thought the particulars were given to the defendant to enable him to know what to plead, as well as to restrain the plaintiff's proof of the claim in his declaration. In that view I agree with the decision of *Patteson, J.*, in *Booth v. Howard*, that the particulars are intended for the benefit and information of the defendant, and there, the plaintiff was seeking that benefit for himself. It is said that, in *Ernest v. Brown*, a distinction was taken between debt and assumpsit with reference to this point; I cannot understand the distinction, nor am I at present inclined to alter the opinion I expressed in *Coates v. Stevens*. As to the necessity for the jury taking the whole particulars together, it is every day's practice to leave to a jury the credit which a statement by a party in his own favour is entitled to, and they may discredit that side of the account and believe the other.

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Rule discharged (b).

(a) Ante, Vol. 3, p. 784.

(b) See *Nichol v. Williams*, post.

FOULKES v. BURGESS.

ON the 5th of January the plaintiff lodged a detainer against the defendant, a prisoner, and declared in the course of Hilary Term. The cause was tried on the 31st March, when the plaintiff obtained a verdict, and signed final judgment in Easter Term following, but did not charge the defendant in execution.

When an action against a prisoner is tried in vacation, the plaintiff must charge him in execution before the end of the following term.

R. V. Richards now moved for a rule to shew cause why

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the defendant should not be discharged out of custody, on the ground that he was supersedeable. The 85th section of 1 Reg. Gen. H. T. 2 Will. 4 (a), ordered that "the plaintiff shall proceed to trial or final judgment against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment, of which the term in or after which the trial was had shall be reckoned one." By the terms of this rule the defendant should have been charged in execution before the end of Easter Term.

Barstow shewed cause.—It must be admitted that the latter part of the rule, if strictly construed, would warrant this application: yet, if taken in connection with the former part, the meaning would seem to be that the plaintiff should in all cases have three terms before he was required to proceed to final judgment: and that he might have three terms before he proceeded to trial; but in that case, the term in or after which the trial was had must be counted as one for the purpose of charging the defendant in execution.

GURNEY, B.—Are you aware of the case of *Borer v. Baker* (b), in which it was held, that if the trial takes place in vacation, and the defendant surrenders after it and before the following term, he ought to be charged in execution in that term?

ALDERSON, B.—The plaintiff should have charged the defendant in execution some time in Easter Term.

Rule absolute (c).

(a) Ante, Vol. 1, p. 1.

(b) Ante, Vol. 2, p. 608.

(c) See *Colbron v. Hall*, ante, Vol. 5, p. 534, *semble contra*.

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LAVERACK v. BILL.

THE action was commenced in the Borough Court of Kingston-upon-Hull. On the 6th of July, an appearance was entered, but issue was not joined until more than six weeks afterwards. On the 15th of September a certiorari, returnable the 2nd of November, issued to remove the cause into this court. The certiorari was delivered to the judge before the jury were sworn, and he received it, and duly transmitted the record to this court, where it was filed.

A Judge of an inferior court has no power to receive a certiorari, unless issued within the time limited by the 21 Jac. c. 23, s. 2, and therefore, where a Judge improperly allowed it, and the record was duly returned and filed, the Court nevertheless awarded a procedendo.

Martin, on the 2nd of November, obtained a rule nisi for a procedendo, on the ground that the certiorari came too late.

Crowder shewed cause.—It is stated in Tidd's Practice (a), "that if a record be filed in the King's Bench upon a certiorari, it can never be sent back or remanded, either in the term in which it is filed or any other; and that is plain by the act of 6 Hen. 8, c. 6, which enables this Court to remand it in case of felony, which otherwise they could not have done." The 21st Jac. 1, c. 23, s. 2, enacts that no writ of certiorari to remove any cause depending in any court of record shall be received or allowed by the judges of the court, except the warrant be delivered before issue or demurrer joined, so as the same be not joined within six weeks next after the arrest or appearance of the defendant. Here, the judge has received the writ, and therefore, the case will be within the 43 Eliz. c. 5, which requires the writ to be delivered before the jury have appeared, and one of them is sworn. [*Parke*, B.—The judge ought not to have received the writ.] In *Cox v.*

(b) Vol. 1, p. 411, ed. 9.

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Hart (a), the habeas corpus was not delivered until after interlocutory judgment had been signed in the court below, and notice given of executing a writ of inquiry; and Lord *Mansfield* says, "The present case is not within the words of the act, that is plain; and it appears that the practice has gone much further than the words of the act, for that has been to allow it *at any time before the jury are sworn*." In *Godley v. Marsden (b)*, the Court refused to award a procedendo, where a cause was removed from an inferior court after interlocutory judgment and before inquiry.

PARKE, B.—There is no doubt the case falls within the statute of James. The judge ought not to have received it; he is wrong in having done so, and might be corrected by the superior court.

ALDERSON, B.—I entirely concur: if it were not so, the judge would overrule the act of Parliament.

Rule absolute.

(a) 2 Burr. 759.

(b) 6 Bing. 433.

HULME and Another, Assignees of SMITH, a Bankrupt,
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Semle, that the plaintiff cannot, by his replication to a plea of "mutual credit," put in issue the credit given by the defendant to the bankrupt, the debt due from

the bankrupt to the defendant, and also the credit given by the bankrupt to the defendant.

Where a person puts his name to a bill of exchange for the accommodation of another, who afterwards becomes bankrupt, that is a credit likely in its nature to end in a debt, and may form the subject of a "mutual credit" within the 6 Geo. 4, c. 16, s. 50.

ASSUMPSIT.—The declaration contained a count for money had and received by the defendant to the use of Smith before he became bankrupt, and a count for money had and received by the defendant to the use of the plaintiffs as assignees since the bankruptcy. The defendant pleaded, besides other pleas, fourthly, as to so much of the second

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count as relates to the sum of 97*l.* 10*s.* parcel of the monies in the second count of the said declaration mentioned, that long before he the defendant had notice that any act of bankruptcy had been committed by the said J. Smith, and long before any fiat of bankruptcy issued against the said J. Smith, and also long before the commencement of this action, to wit, on &c., the defendant gave credit to the said J. Smith in and to a large amount, to wit, the amount of 50*l.*, by indorsing for the accommodation of the said J. Smith, and at his request, and without any consideration paid or given to him the defendant for so doing, a certain bill of exchange drawn by the said J. Smith upon Melhuish and Company, for 50*l.*, and payable to the order of the said J. Smith; which said bill the said J. Smith afterwards, and before any notice to the defendant of his said bankruptcy, to wit, on &c., negotiated and transferred for value; and the defendant further says, that afterwards, and long before the defendant had notice that any act of bankruptcy had been committed by the said J. Smith, and before the date or issuing of any fiat of bankruptcy against the said J. Smith, and also long before the commencement of this action, to wit, on &c., the defendant gave credit to the said J. Smith in and to a certain other large amount, to wit, the amount of other 50*l.* of like lawful money, by discounting for the said J. Smith at his request a certain other bill of exchange drawn by the said J. Smith on M. & Co. for 50*l.*, payable to the order of the said J. Smith, and indorsed by the said J. Smith, which said bill the defendant afterwards, and before any notice to him of the bankruptcy of the said J. Smith, indorsed and negotiated and transferred for value; and the defendant says that the said credits so respectively given by him to the said J. Smith as aforesaid, were credits of a nature extremely likely to end in debts from the said J. Smith to the defendant, and amounting together to a large sum, to wit, the sum of 100*l.* And the

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defendant further says, that afterwards, and before the commencement of this suit, to wit, on &c., the defendant was called upon and obliged to pay and satisfy the two bills of exchange above mentioned to certain persons, being respectively the holders thereof, in consequence of the said bills having been dishonored by the acceptors thereof respectively when they became due, of which the defendant had due notice; and thereupon, and before the commencement of this action, the said J. Smith became, and at the time of the commencement of this action was and still is indebted to the defendant in a large sum of money, to wit, the sum of 100*l.*, being the amount of the said last-mentioned bills of exchange, for money paid by the defendant for the use of the said J. Smith, at his request, which said last-mentioned sum of money is the same identical sum in and for the amount of which the defendant had given credit to the said J. Smith as aforesaid; and the defendant further says, that before the bankruptcy of the said J. Smith, and also before the commencement of this action, to wit, on &c., the said J. Smith drew his bill of exchange in writing, and directed the same to the Chesterfield Banking Company, to pay to himself or bearer the sum of 97*l.* 10*s.*; and the said J. Smith then, and before the bankruptcy of him the said J. Smith, delivered the same to the defendant by way of loan, in order that the defendant might receive the amount of the same, and thereby then gave credit to the said defendant to and in the amount of the same; and the defendant afterwards, before the bankruptcy of the said J. Smith, and also before the commencement of this action, to wit, on &c., presented the said last-mentioned bill of exchange for payment to the said drawees thereof, and the defendant afterwards, and after the bankruptcy of the said J. Smith, but before the commencement of this action, to wit, on &c., received from the said drawees of the said bill of exchange the said sum of 97*l.* 10*s.*, being the amount of the

said last-mentioned bill of exchange, which said sum of 97*l.* 10*s.* so received by the defendant, is the same sum of 97*l.* 10*s.* in the introductory part of this plea, and in the second count of the declaration of the plaintiffs mentioned; and the defendant says, that the said sums of money in the amount whereof the defendant so gave credit to the said J. Smith as aforesaid, and which were afterwards paid by the defendant for the use of the said J. Smith at his request, amount in the whole to a large sum, to wit, the sum of 100*l.*, which said last-mentioned sum exceeds the sum of 97*l.* 10*s.* in the introductory part of this plea, and in the second count of the declaration mentioned, and the damages sustained by the plaintiffs by reason of the non-performance of the premises by the said defendant in respect thereof; and out of which said sum of 100*l.*, the defendant is ready and willing, and hereby offers to set off and allow to the said plaintiffs the full amount of the said damages, according to the form of the statute in such case made and provided. Fifthly, as to so much of the second count of the said declaration as relates to the sum of 19*l.* 19*s.*, parcel of the moneys in that count mentioned, the defendant says that the said J. Smith before and at the time of his bankruptcy, to wit, on &c., was and ever since has been, and still is indebted to the defendant in a large sum of money, to wit, the sum of 20*l.* for goods before then sold and delivered by the said defendant to the said J. Smith at his request, and for money found to be due from the said J. Smith to the defendant on an account for them stated between them; and the defendant further saith, that afterwards, and before the bankruptcy of the said J. Smith, and also before the commencement of this action, to wit, on &c., J. Smith made his bill of exchange in writing, and directed the same to the Chesterfield Banking Company, and thereby ordered the Chesterfield Banking Company to pay to the said J. Smith or bearer a much larger sum than the said sum of 20*l.* so due and owing from the said

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J. Smith to the defendant as aforesaid, to wit, the sum of 97*l.* 10*s.*, and delivered the same to the defendant by way of loan, in order that the said defendant might receive the amount of the same, and thereby then gave credit to the defendant to the amount of the same; and the defendant afterwards, and after the bankruptcy of the said J. Smith, to wit, on &c., received the sum of 19*l.* 19*s.*, part of the amount of the said last-mentioned bill, from the drawers thereof, which said sum of 19*l.* 19*s.* so received by the defendant as last aforesaid, is the same sum of 19*l.* 19*s.* in the introductory part of this plea, and in the second count of the said declaration mentioned; and the defendant says that the said sum of 20*l.* so due and owing from the said J. Smith to the defendant as aforesaid, exceeds the damages sustained by the plaintiffs as such assignees as aforesaid, by reason of the nonperformance by the defendant of his the defendant's promises as to the said sum of 19*l.* 19*s.* in the introductory part of this plea mentioned; and the defendant is ready and willing, and hereby offers to set off and allow to the said plaintiffs the full amount of the said last-mentioned damages out of the said sum of 20*l.* so due and owing to the defendant as aforesaid, according to the form of the statute in that case made and provided. Replication to fourth and fifth pleas, that defendant did not give credit to the said J. Smith, and that the said J. Smith did not give credit to the defendant, and that the said J. Smith was not nor is indebted to the defendant, *modo et formâ*. Special demurrers to the replications to the fourth and fifth pleas, assigning for cause, that the replication is double and bad for duplicity in this, to wit, that the plaintiffs endeavoured to put in issue several distinct points; namely, the credit given by the defendant to the said J. Smith, and the debt due from the said J. Smith to the defendant; and also the credit given by the said J. Smith to the defendant, by traversing either of which the plea would have been answered; and for that the said

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replication is multifarious, and the plaintiffs have endeavoured, by means of it, to put the same matters in issue, which would have been put in issue by a replication of *de injuriâ*, which replication of *de injuriâ* would have been bad had they made use of it: and for that the plaintiffs, if they had a right to traverse all the several matters contained in the plea in one and the same replication, ought to have traversed them by a replication of *de injuriâ*, that being the form appointed by the law in such a case; and further, for that the plaintiffs have in their said replication traversed matter not traversable, and have taken issue upon a mere allegation, inference, and question of law, namely, on the question whether the facts stated in the said fourth plea amount to mutual credits within the meaning of the statute in that case made and provided. The points for argument on the part of the plaintiffs were, that the objections taken by the demurrers are not fatal, and that the fourth and last pleas are bad on the ground that they do not shew a mutual credit-debtor demand within the meaning of the Bankruptcy Act, sect. 50.

J. W. Smith, in support of the demurrers.—The replications fall within the rule of law stated by *Park, J.*, in *Selby v. Bardons* (a), that when any pleading comprises several traversable facts or allegations, the whole ought not to be denied together, but one point alone disputed; and that the tendency of such a rule is to simplify the trial of matters of fact, and to save much expense in litigation. A similar rule is laid down in that case by *Tenterden, C. J.* On the argument in error (b), *Tindal, C. J.*, remarks upon the difficulty in principle to account for the departure from the general object which the rules of special pleading have in view, namely, that of bringing the matter in dispute between the litigant parties to one

(a) 3 B. & Adol. 10.

(b) 3 Tyrw. 435.

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certain and single issue in fact. The traverse in the present case is a stronger instance of departure from the law, and the replication presents a wider issue, than that raised in any of the previous cases. In *Faulkner v. Chevell* (a), which was an action of debt for penalties incurred by the defendant in having acted as an attorney, whilst he was deputy clerk of the peace, a plea that the defendant was not such deputy, nor did he commit the supposed offences, was held bad for duplicity. To an ordinary plea of set-off the replication would be nil debet, but here the replication puts in issue not only the debt, but also the credit stated to have been given by the defendant to the bankrupt. [*Parke, B.*—The ordinary plea of set-off consists of several distinct debts, all of which may be traversed under one general replication.] If the plaintiff had replied that the bankrupt did not receive credit from, and was not indebted to the defendant in manner and form, that would resemble the ordinary replication to a plea of set-off; but here, the plaintiff has traversed not only the credit given by the defendant to the bankrupt, but also the credit given by the bankrupt to the defendant, so that both sides of the account are in issue. In order to frame a plea of mutual credit, it is necessary to state both the credit given by the bankrupt to the defendant, and by the defendant to the bankrupt, and also the debts arising in consequence of that credit, and to shew that the plaintiff's claim is of such a nature that the defendant has a right to set off against it the debt due from the bankrupt to him. There, the plaintiffs not only traverse the debt claimed by the defendant from the bankrupt, but also the nature of a claim by the bankrupt upon the defendant. The facts traversed by this replication would form the subject-matter of two distinct actions, viz., one by the bankrupt against the defendant, and the other

(a) 5 Adol. & E. 213; 6 N. & M. 704.

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by the defendant against the bankrupt, for the amount of the two bills indorsed by him, and which the defendant was obliged to take up. The plaintiffs being assignees, and having the bankrupt's books under their controul, could easily ascertain whether the account is true or false; and it would be no hardship on them to admit it if true, and take a single issue if false. Under this replication, the defendant would be obliged at the trial to prove the bankruptcy, that the bills were presented and dishonoured, and also to go into all the evidence requisite under the ordinary replication to a plea of set-off. In *White v. Reeves* (a), it was held that a rejoinder to a replication in trespass for stopping up a private way under an inclosure act, alleging that the commissioner did not direct the way to be stopped up, or give any orders relating to the same, or by his award set out or appoint any other way in lieu of it, was bad for duplicity. In *Griffin v. Yates* (b), which was an action by indorsee against acceptor of a bill of exchange, the defendant pleaded that he accepted the bill for the accommodation of the drawer, and upon an understanding that he should furnish funds for the payment of the bill, that the defendant had received no consideration for the bill, and that the drawers indorsed the bill after it became due for the accommodation of the plaintiff, and without any consideration: the replication traversed all these facts, and the Court were of opinion that such a traverse was bad, though the same facts might be put in issue by the replication of *de injuriâ*. It would seem from the case of *Regil v. Green* (c), that though immaterial matter may not make a plea double, yet a traverse of both material and immaterial parts of the plea is bad on special demurrer, as tending to make uncertain what is the issue to be tried. There is no doubt that issue may be taken on several facts so con-

(a) 2 J. B. Moore, 23. (b) 2 Bing. N. C. 579. (c) 1 M. & W. 328.

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nected with the circumstances of time and place as to constitute but one defence. [Lord *Abinger*, C. B.—Is not this replication in effect that there were no such mutual credits as are alleged in the plea?] It is not enough that the replication should in effect present some legal answer, but it must consist of facts so connected as not to raise distinct issues, which may embarrass the jury at the trial; if it were not so, the replication *de injuriâ* ought never to have been made the subject of argument. The cases which may be cited on the other side are reconcilable with the principle contended for. In *Webb v. Weatherby* (a), the plaintiff, by his replication, put in issue both a payment in satisfaction and an acceptance in satisfaction; and *Tindal*, C. J., held the replication good, on the ground that a receipt in satisfaction virtually implied a payment in satisfaction; and that the one allegation could not be true without the other. In *Robinson v. Bayley* (b), the facts of the cattle being the defendant's, and that they were commonable, and levant and couchant, presented only one issuable point, namely, the alleged right of common. So in *O'Brien v. Saxon* (c), the bankruptcy, the trading, and the petitioning creditor's debt, constituted but one entire proposition.

Cowling, contra.—The pleas do not shew a mutual credit within the meaning of the 6 Geo. 4, c. 16, s. 50. The credit must be of such a nature as necessarily to end in a debt, but the credit stated in the pleas might never end in a debt, as it was the duty of the party for whose accommodation the bills were provided to take them up when they became due. [*Parke*, B.—Is not this a debt which might be proved under the commission, and if so, it falls under the latter part of the clause.] It is admitted that the debt might be proved under the commission,

(a) 1 Bing. N. C. 502. (b) 1 Burr. 316. (c) 2 B. & C. 908.

but still the defendant might not be entitled to set it off. [*Parke, B.*—It was held in *Smith v. Hodson* (a) before the late act, that when a defendant lent his acceptance to a bankrupt on a bill which did not become due until after the bankruptcy, and was then outstanding in the hands of third persons, yet the defendant, having paid the amount after the commission issued, and before action brought by the assignees, was entitled to set off the same under the words “mutual credit.”] But when the fact of the credit ending in a debt is merely contingent, it cannot form the subject of a set-off: *Glennie v. Edmunds* (b). Here the giving credit by indorsing a bill was only a contingent debt. To get over that difficulty the defendant owns in his plea that the credit was likely to end in a debt. In *Carter v. Breton* (c) the defendant accepted a bill of exchange for the bankrupt after he had committed a secret act of bankruptcy, and the bill was paid away by the bankrupt, who on the same day agreed to sell the defendant four horses as a security for the amount, and that was held not to be a case within the eighty-second section. In *Clarke v. Fell* (d) a tradesman undertook to do work upon an article delivered to him by a person to whom he was indebted, and it was agreed the work should be paid for in ready money: he afterwards became bankrupt, and the Court held that the 50th section of the bankrupt act did not render the assignees liable in trover for refusing to deliver such article to the creditor on his offering to set off the price of the work against his own demand. [*Parke, B.*—*Ex parte Wagstaff* (e), *Smith v. Hodgson* (a), and *Ex parte Boyle* (f), are precisely in point. In *Ex parte Young* (g), Lord Eldon says, “In

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(a) 4 T. R. 211.

(b) 4 Taunt. 775.

(c) 6 Bing. 617.

(d) 4 B. & Adol. 404.

(e) 13 Ves. 65.

(f) Cook's Bankrupt Law, 563.

(g) 3 Ves. & B. 40.

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general cases the acceptor is primarily liable upon the bill, and the drawer may be in the nature of a surety; but if the real transaction is that as between them the drawer shall be first liable, after what has passed at law, and here, with reference to the acceptor having or not having effects, I state from a perfect recollection, that when that bill passed it was in contemplation, when justice required it, that the acceptor should be considered a person liable for the drawer: but the further circumstances of each case are to be looked at, and if a person has become liable under this section (49 Geo. 3, c. 121, s. 8) of the act he is to have relief.]

Secondly. When several facts taken together make but one single point, the whole may be put in issue: *Robinson v. Bayley* (a). In the ordinary replication of set-off, the replication denies the several facts alleged in the plea. Here the credit given by the bankrupt to the defendant, the credit given by the defendant to the bankrupt, and the debt due from the bankrupt to the defendant, make but the single point of a mutual credit within the meaning of the statute. In *Faulkner v. Chevell* (b) the circumstance of the defendant being deputy clerk of the peace, and that he committed the alleged offence, were distinct facts. [*Alderson*, B.—The defendant says, the debt due from me to the bankrupt is a debt of a peculiar nature. You take issue not only upon the debt, but upon the fact of his having a set-off to that debt. *Parke*, B.—If the assignees could shew that the defendant was indebted to a bankrupt for goods sold after the act of bankruptcy, they would be entitled to recover though the bankrupt was indebted to the defendant in a larger amount. The question is, whether the assignees can by their replication put in issue the legality of the debt?]

(a) 1 Burr. 316.

(b) 5 Adol. & E. 213.

Lord ABINGER, C. B.—Had you not better amend?

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The case stood over to allow *Cowling* time to consider, and he afterwards consented to amend.

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MORRELL and Another v. PARKER.

THE defendant was arrested upon an affidavit which stated that he "was indebted to deponent and J. Morrell, this deponent's co-partner, in 200*l.*, for money lent by this deponent and the said J. Morrell and one Cox, their late co-partner, to the defendant, at her request."

Where an affidavit of debt alleged the defendant to be indebted to two persons for money lent by them and their late co-partner, the Court ordered the bail-bond to be delivered up to be cancelled upon an affidavit that the third partner was still alive.

Erle had obtained a rule nisi to deliver up the bail-bond, to be cancelled on entering a common appearance, upon an affidavit which stated that Cox was still alive.

W. H. Watson shewed cause, and contended that if an affidavit be good upon the face of it, the Court would not receive another affidavit negating the facts stated therein.

PARKER, B.—How can the defendant be indebted to the two upon a debt contracted with the three, unless one was dead? The rule must be absolute.

ALDERSON, B.—The deponent could not be indicted for perjury upon proof of the other partner being alive.

Rule absolute.

1837.

LEWIS v. GOMPERTZ.

When a prisoner prevents a plaintiff from declaring in due time, by reason of an order of the Court of Chancery, that is not a case requiring notice within the rule of H. T. 2 Will. 4, s. 87.

DOWLING moved to discharge the defendant, a prisoner, out of custody as to this action, on the ground that he was supersedeable. A detainer had been lodged against him in October, 1836, and the plaintiff had not declared in consequence of an injunction of the Court of Chancery obtained by the defendant, prohibiting the plaintiff from proceeding. The question was whether, under these circumstances, the case fell within the rule of 1 Reg. Gen. H. T. 2 Will. 4, s. 87 (a), which required a notice to be given to the Marshal in certain cases to deprive a prisoner of his right to a supersedeas, to which he would, according to the general rules and practice of the Court, be otherwise entitled. Here, no notice whatever had been given to the Marshal.

ALDERSON, B.—It appears to me that this is not a case within the meaning of the rule; it is a matter peculiarly within the defendant's own knowledge. Besides, it would

(a) "If by reason of any writ of error, special order of the Court, agreement of parties, or other special matter, any person detained in the actual custody of the Marshal of the King's Bench Prison, or Warden of the Fleet, be not entitled to a supersedeas or discharge, to which such prisoner would, according to the general rules and practice of the Court, be otherwise entitled, for want of declaring, proceeding to trial or judgment, or charging in execution, within the time prescribed by such general rules and practice, then and in every such case the plaintiff or plaintiffs at whose suit such prisoner shall be so detained in custody, shall with all

convenient speed give notice in writing of such writ of error, special order, agreement, or other special matter, to the Marshal or Warden, upon pain of losing the right to detain such prisoner in custody by reason of such special matter; and the Marshal or Warden shall forthwith, after the receipt of such notice, cause the matter thereof to be entered in the books of the prison, and shall also present to the Judges of the respective courts from time to time a list of the prisoners to whom such special matter shall relate, shewing such special matter, together with the list of the prisoners supersedeable."

be strange that a defendant should be discharged out of custody in consequence of an act not having been done by another party, when he himself has prevented it.

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Rule refused.

—◆—
 EAGAR v. CUTTHILL.

GODSON had obtained a rule nisi for the costs of the day for not proceeding to trial pursuant to notice, and “why all proceedings should not be stayed until after payment of those costs.” Due notice of the motion had been given.

A stay of proceedings cannot be incorporated in a rule nisi for costs of the day for not proceeding to trial.

Barstow shewed cause, and objected that there was no precedent of a rule for the costs of the day for not proceeding to trial being drawn up with a stay of proceedings.

Godson, in support of the rule, contended that he was fully warranted in drawing up the rule in that form by the case of *Jones v. Hows* (a), from which it appeared that a rule nisi for judgment as in case of a nonsuit must be drawn up with a stay of proceedings. There was no distinction in principle between that case and a rule for costs of the day.

PARKE, B.—It is not the practice to incorporate a stay of proceedings in a rule for the costs of the day, and there is no reason for departing from the ordinary course. The rule must be absolute as to the other part, and discharged as to the remainder, with costs.

Rule accordingly.

(a) Ante, Vol. 5, p. 600.

1837.

SHOEBRIDGE v. IRWIN.

When a declaration is delivered on Saturday, the Sunday immediately following is reckoned in the computation of time.

THE declaration was delivered on Saturday the 28th October, and on the following Thursday morning, the plaintiff signed judgment for want of a plea.

Humfrey moved to set aside the judgment for irregularity. The defendant had the whole of Thursday to plead: the 8 Reg. Gen. H. T. 2 Will. 4, (a), orders that where any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, &c., in which case the time shall be reckoned exclusive of that day also. Here, Saturday being excluded, and Sunday then becoming the first day, must be excluded also. [*Alderson*, B.—The rule says you shall exclude the first day, that is, the day on which the declaration is delivered.] No doubt, if the declaration be delivered on Monday, the defendant must plead on Friday, but here, Sunday being the first day, must be excluded, and then the time would not expire until Friday.

LORD ABINGER, C. B.—Your fallacy is in taking Sunday for the first day, which it is not.

ALDERSON, B.—The rule means that in computing the time the day of service must be excluded. Here, if you exclude Saturday, which is the day of service, then you begin counting with Sunday, and if Sunday be the last day, you exclude that also.

Rule refused.

(a) Ante, Vol. 1, p. 200.

1837.

WAIT and Another v. COOMBES.

THE plaintiffs, Wait and James, entered a plaint in the Tolsey Court at Bristol, against a person of the name of Coombes, and thereupon a foreign attachment issued, and a return was made, that there were certain oats, the property of Coombes, within the jurisdiction. Upon the 14th of February, one Bruce filed his claim of property in the goods attached; and on the 1st of April the plaintiffs replied, denying his claim, and added the similiter. The issue was entered by the plaintiffs on the 11th of May. The usual mode of entering the issue, is to state the mere fact of issue being joined, in a book kept for that purpose, and it was sworn that such entry is all that is required. Bruce's attorney swore, that on the 20th of June, he was not aware of the replication being filed, or of the issue being entered. On the 29th of June, Bruce gave notice to the attorney of Wait and James, that he did not accept the issue, and that he intended to apply for a certiorari. A court was held on the 12th of July, at which the recorder presided (there being no court day before that time), and an application was made to him to strike out the issue, on the ground that the similiter had been added without the consent of Bruce. This being refused, the certiorari was produced. The counsel for the plaintiffs objected to the allowance of the certiorari, on the ground that six weeks had elapsed since issue joined, and 1 Tidd, 405, was cited. The learned recorder having refused to allow the certiorari,

Semble, that a writ of certiorari cannot be had by the claimant of goods under a foreign attachment.

In such a case the joinder of issue with the claimant is a joinder of issue within the 21 Jac. 1, c. 23, s. 2, and therefore, if the writ could be had, it must be sued out within six weeks after that issue joined.

Manning moved for a rule nisi for an attachment.—He contended that this was not an issue joined within the meaning of the 21 Jac. 1, c. 23, s. 2, which applied only to issue joined between the plaintiff and defendant, and not between the plaintiff and a claimant.

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F. Kelly shewed cause.—As to whether or no issue was joined, is entirely a question of practice, and must be determined by the judge of the court. The learned Recorder is present to certify that issue was joined according to the practice of the court. [*Parke, B.*—There is no custom to take the certificate of the Recorder of Bristol: the custom applies exclusively to the city of London. *Alderson, B.*—Is there any affidavit that issue was not joined? it is incumbent on the party who applies for an attachment to make out his case.] It appears from these affidavits that issue was joined, though not between the original plaintiff and defendant. Though in the proceeding by foreign attachment, if a defendant cannot find bail below he may sue out a certiorari upon putting in bail in the court above, *Cross v. Smith (a)*, yet it has never been held that a *party claiming* the goods can have a certiorari. The writ can only be had in cases in which the superior court can administer the same justice to the parties as the court below; but where the inferior court has jurisdiction, and the court above has not, a certiorari cannot be had (*b*). It is difficult to say by what process this court could do justice between the original defendant and the claimant. *Cross v. Smith* is the only authority that a certiorari can be had upon a proceeding by foreign attachment, and that case confines it to the original defendant. There, Lord *Holt*, speaking of inferior jurisdictions, says, “The third sort are exempt jurisdictions, as where the king grants to a city, &c., that the inhabitants shall be sued within the city and not elsewhere. Such a grant may be pleaded to the jurisdiction of the King’s Bench, &c., if there is a court there that can hold plea of the cause. But nobody can take advantage of it but the defendant, and if he sues a certiorari it will remove the cause, because the defendant has waived his

(a) 2 Lord Raym. 837.

(b) 1 Tidd, 398.

privilege for his own benefit." By what jury process could the disputed claim be tried? [*Parke, B.*—The rule is, that a certiorari does not remove the cause in the state in which it is, but the parties must begin again. How could that be done in this case?]

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The Court then called upon

Manning in support of the rule. The last objection is met by the authorities cited in 1 Roll. Abr. (a), and in Viner's Abr. (b), in which it is laid down, that "where the court which awards the certiorari cannot hold plea upon the record itself, then only a tenor shall be certified; because otherwise if the record itself should be removed, there would be a failure of right afterwards." [*Parke, B.*—The rule is, that upon a removal by certiorari the parties must begin *de novo*: then the first step will be to declare upon the original cause of action.] The claim in this case may be considered as equivalent to a plaint. [*Parke, B.*—If so, issue has been joined within the meaning of the statute. How can this court have jurisdiction upon a claim of goods which are not in its possession?] As no judgment has been given in the original cause, a writ of error would not lie, and consequently there would be a failure of justice: *Dr. Grenville v. The College of Physicians* (c). But further, there has not been any issue joined within the meaning of the 21 Jac. 1, c. 23, s. 2. That statute enacts, "that no writ of certiorari to stay or remove any cause depending in an inferior court of record having jurisdiction thereof shall be received or allowed by the judges or officers of such court, but they may proceed therein, &c., except the said writ be delivered to such judges or officers before issue joined in the said cause, so as the same be not joined

(a) Tit. Certiorari (C), 1.

(b) Ib.

(c) 12 Mod. 390.

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within six weeks next after the *arrest or appearance of defendant.*" That must mean an appearance upon summons. It could never be contended that Coombes, the original defendant, is precluded by the issue joined between Bruce and the plaintiffs; and if so, no other party could be, or this absurdity would follow, that the record is removable by one party and not by another.

PARKE, B.—If Bruce is a party to the suit, and he certainly comes in quasi garnishee, the certiorari is too late.

ALDERSON, B.—You are within the literal words, and also the spirit of the act. The act provides that a party shall apply for the writ before issue joined; and there is a further provision that issue must not be joined within six weeks after appearance, or you may apply for the writ. You have had all the substantial advantages.

Rule discharged, with costs.

HOLTON v. GUNTRIP.

A sheriff is not entitled to relief under the Interpleader Act, unless he has actually seized or is in possession of the goods.

THIS was a sheriff's rule, under the Interpleader Act. It appeared that the sheriff had gone to the premises for the purpose of levying, but upon a claim having been set up to the goods, he had withdrawn without making any seizure.

Ball appeared for the claimant.

Gurney, for the execution-creditor, contended that, as the goods had never been seized, the sheriff was not entitled to relief. He referred to *Braine v. Hunt* (a).

Dowling, for the sheriff.—The words of the act (b) are,

(a) Ante, Vol. 2, p. 391.

(b) 1 & 2 Will. 4, c. 58, s. 6.

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that when any such claim shall be made to any goods or chattels taken *or intended to be taken* in execution under such process, &c., it shall and may be lawful to and for the Court from which such process issued, upon application of such sheriff, or other officer, made before or after the return of such process, and as well before as after action brought against such sheriff or other officer, to call before them by rule of court, &c. The act provides not only for the case of goods actually seized, but also where there is an intention to take them in execution. [*Parke, B.*—That is the question, whether it does not come within the words of the act, “intended to be taken.” Lord *Abinger, C. B.*—If the sheriff withdraws upon a claim being set up, he does not come to the Court intending to take the goods, but exercises his own judgment.] The act enables him to apply to the Court either before or after the return. [Lord *Abinger, C. B.*—That was intended to apply to cases in which the sheriff might obtain time to make his return. [*Alderson, B.*—The act was framed in order to get rid of the difficulty of affording the sheriff relief in a court of equity. But there is no instance of an interpleader where a party has not possession of the goods, and is therefore unable to deliver them to one or the other. How can we bar the claimant, if he runs away with the property? *Parke, B.*—I am not sure the Court might not in such a case interfere to relieve a stranger.]

Per CURIAM.—The rule must be discharged, with costs.

Rule discharged, with costs.

1837.

ARCHER, one, &c. v. GARRARD.

A plea of *nunquam indebitatus* as to all except a certain sum, and a tender of that sum, does not require a rule to plead several matters. And where in such a case the plaintiff signed judgment for want of a rule, it was held that the defendant did not waive the irregularity by attending the taxation of costs and making no objection.

TO a declaration in debt, the defendant pleaded *nunquam indebitatus* as to all the sums mentioned, except as to 40*l.*, and a tender of that sum. On the following day, the 7th November, a summons was taken out by the plaintiff, to set aside the pleas as irregular, there having been no rule to plead several matters. This summons was abandoned, and on the 10th the plaintiff, still treating the pleas as irregular, taxed his costs, and signed final judgment on the 11th. It was sworn that the defendant's attorney attended the taxation of costs, and made no objection until the 13th, when a rule nisi was obtained to set aside the judgment for irregularity.

Erle shewed cause.—The 34th sect. of 1 Reg. Gen. H. T. 2 Will. 4 (a), enables a party to sign judgment, if several pleas are pleaded without a rule for that purpose. The question then is, whether a rule is not required in the present case by the 13th rule of T. T. 1 Will. 4 (b), which provides “that no summons or order shall be necessary in the following cases; that is to say, where the plea of non-assumpsit, or nil debet, or non detinet with or without a plea of tender as to part, a plea of the Statute of Limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, infancy and coverture, or any two or more of such pleas, shall be pleaded together; but in all such cases a *rule shall be drawn* up by the proper officer, upon the production of the engrossment of the pleas, or a draft or copy thereof.” [*Parke*, B.—These pleas, taken together, afford but one answer to the whole declaration; if, indeed, there had also been a plea of the Statute of Limitations, or insolvency, or *plene administravit*, then it would have been necessary to have a rule: there is not the least doubt about

(a) Ante, Vol. 1, p. 187.

(b) Ante, Vol. 1, p. 105.

it.] The practice has always been to obtain a rule in cases of this kind. [*Parke, B.*—The judges could have no power to make two pleas of that which was one only at law.] Then the defendant has taken an intermediate step by attending the taxation of costs, and must be considered as having waived the objection.

Per CURIAM.—The rule must be absolute.

Rule absolute.

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GRIFFITH v. ROXBURGH.

ASSUMPSIT by indorsee against indorser of a bill of exchange. The declaration contained a count on the bill and counts for money lent, and money due on an account stated, and the promise laid was, “that defendant afterwards, on &c., in consideration of the last-mentioned premises, promised the plaintiff to pay him the said several last-mentioned monies respectively on request.” The defendant pleaded to the first count, no notice of dishonour, and to the other counts non-assumpsit. The plaintiff having obtained a verdict,

Semble, that it is not necessary to allege a promise in a count on a bill or note. At all events, the omission can only be taken advantage of in an action by indorsee against indorser on special demurrer.

Mansel moved to arrest the judgment, on the ground that the count on the bill contained no promise.

Fish shewed cause.—It is unnecessary to allege a promise where the law necessarily implies one. *Mountford v. Horton* (a), *Corbett v. Packington* (b). In *Starkey v. Cheesman* (c), which was an action against the drawer of a bill of exchange, the declaration stated that the acceptor refused to pay, per quod onerabilis devenit &c., but laid no express promise, and Lord *Holt* says, “the drawing of a bill is an actual promise.” That decision was recognized in *Wegersloff v. Keene* (d). In *Buckler v. Angel* (e), the

(a) 2 N. R. 62.

(b) 6 B. & C. 268.

(c) Salk. 128; Carth. 509.

(d) 1 Str. 214.

(e) 1 Sid. 246.

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plaintiff declared, that in consideration that he had procured J. S. to surrender a messuage, the defendant *would pay* him 10*l.* when requested, and there the Court held the declaration bad for want of a promise; but the reason was that the plaintiff might have procured the surrender gratuitously, or under covenant to do it: a promise was therefore necessary to support the consideration. *Lee v. Welch* (a) was an action for goods sold and delivered; and in that case a promise to pay is not necessarily implied by law, as the goods may have been sold upon a credit which has not expired, or upon some other condition. But here, the facts being stated upon which the defendant's liability arose, the law implies a promise by him to pay the amount. In *Wegersloff v. Keene* (b), *Fortescue, J.*, refers to a case of *Lowther v. Conyers*, in which it was held, that in an action upon a promissory note, the want of *super se assumpsit* did not vitiate the declaration, because the law raises a promise. In *Bayley on Bills* (c), it is said, that the allegation of a promise is unnecessary in an action against either the acceptor of a bill or the maker of a note, and it may be doubted whether it is essential in any other.

But, at all events, the omission is cured by verdict. The rule laid down in 1 Saund. 227, n., that if there be any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or that the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict by the common law. [*Alderson, B.*—The only issue here was, whether the defendant had due notice. The ground

(a) 2 Str. 793.

(b) 1 Str. 214.

(c) 5th edit. 408.

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upon which a defect is cured by verdict, is that the fact must necessarily have been proved at nisi prius. Suppose the averment of presentment were omitted, would that be cured by verdict?] *Starkey v. Cheesman* was after a judgment by default, and the case would be stronger after verdict. *Henry v. Burbidge* (a) arose on special demurrer, and *Tindal*, C. J., distinguishes it on that ground from *Starkey v. Cheesman*.

Mansel, in support of the rule.—The plaintiff shews an imperfect title upon the face of the declaration. The uniform practice has been to allege a promise, and the form which the judges have given in the new rules, shews that they considered it necessary. The verdict does not cure where the title is itself imperfect, but only when it is imperfectly alleged. The replication de injuriâ in assumpsit is, that the defendant “broke his promise” without the cause alleged. The defendant is sued upon his promise, and not upon his mere liability. The cases of *Mountford v. Horton*, and *Corbet v. Packington*, only shew that the Court will import a promise from the statement of an *agreement*. In *Starkey v. Cheesman*, the plaintiff declared upon the usage and custom of merchants; *Lee v. Welch* is precisely in point. [*Alderson*, B.—The defendant cannot now plead non-assumpsit to a count on a bill. Is it not then strange that the declaration should be bad for not containing an averment which the defendant is precluded by act of parliament from denying?] It does not follow that the allegation of a promise is dispensed with because the defendant is compelled to deny particular facts.

BOLLAND, B.—*Starkey v. Cheesman* is decisive against the present objection. A distinction has been attempted to be drawn, upon the ground that in that case the custom

(a) Ante, Vol. 5, p. 484.

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of merchants is set out; but it appears from Bayley on Bills, 382, that no reference to the custom is necessary.

ALDERSON, B.—I am of the same opinion. Before the new rules the question might have been different; but surely it cannot now be necessary to allege a promise when the defendant is precluded from denying it. The defendant must deny “some matter of fact alleged,” which shews that if the matter of fact alleged be true, the promise to pay necessarily follows. At all events the omission is mere matter of form, which must be taken advantage of on special demurrer.

GURNEY, B., concurred.

Rule discharged.

In re the Sheriff of OXFORDSHIRE.

Where goods were taken in execution, and a claim was set up under a bill of sale which bore date after the levy, the Court discharged the sheriff's application for relief, and made him pay the costs of the execution-creditor.

THIS was a sheriff's rule under the Interpleader Act. It appeared that a testatum fieri facias had been delivered to the sheriff on the 30th October, under which he levied on that day; and on the 1st November a notice was served upon him, that the goods in question were claimed by one Field under a bill of sale.

R. V. Richards shewed cause, upon an affidavit that the bill of sale was dated the 1st November.

PARKE, B.—Before the sheriff applied to the Court he ought at least to have looked at the date of the bill of sale, and if he had done so, this application would probably have been unnecessary. The rule must be discharged, and the sheriff must pay the costs of the execution-creditor.

Rule accordingly.

Cooper, for the sheriff.

Chilton, for the claimant.

1837.

ANGUS v. COPPARD and Others.

THIS was an action of trespass against seven defendants, for forcibly taking possession of a house and premises situate at Horsham, in the county of Sussex. The plaintiff's attorney, being desirous of trying the cause at the then next assizes, in order to serve the defendants, who live in different parts of the county, issued, at the same time, two writs bearing date the 1st July. One of the defendants only was served with one of the writs, and the other six with the other writ. The defendants not having appeared, the plaintiff entered one appearance for all, and served a notice of declaration. One of the defendants, named Medwin, took the declaration out of the office, but without notifying that it was taken by him alone, and it appeared in the books as if taken out by all the defendants. An application was made to *Williams, J.*, to set aside the appearance entered for the defendants on the ground of irregularity, and he taking time to consider, judgment was, in the meantime, signed against the other defendants. This judgment was afterwards set aside, with liberty for the defendants to plead, and also to apply to the Court respecting the regularity of the appearance. The cause was tried, and a verdict found for the plaintiff.

It is not irregular to issue two writs, either of summons or capias, against several defendants for the same cause of action, provided the writs be issued upon one præcipe, and bear date the same day.

Clarkson having obtained a rule to set aside the appearance for irregularity,

Thesiger and *Ogle* shewed cause, and objected that the application was too late after trial and verdict. They referred to *Christie v. Walker (a)*, in whichailable process issued against one defendant, and on another day serviceable process against four other defendants, and one declaration

(a) 1 Bing. 48.

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was delivered against all, and it was held that the declaration was regular.

Sir *W. Follett*, *Clarkson*, and *Tyndale*, *contrà*, referred to *Pepper v. Whalley* (a), and *Woodcock v. Kilby* (b).

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court.—There was a question of practice, which arose upon an application to set aside an appearance entered for several defendants upon two writs of summons sued out for the same cause of action, and, as far as we can learn from the affidavits, both bearing the same date. The question then is, whether it was irregular to sue out two such writs of the same date and for the same cause of action. The Court wished to take time to consult the officers of the other Courts; and they report that there is no irregularity in suing out two writs of summons against several defendants for the same cause of action, provided both writs be issued upon one præcipe, and both bear the same date; and as a matter of convenience it ought to be so, as there would be difficulty in serving one writ upon several defendants who might reside at a distance from each other, and there can be no hardship on the defendants, as they are not bound to pay more than the costs of one writ. With respect to the writ of *capias*, it is quite clear that there must be two writs, where the defendants reside in different counties. The rule must be discharged with costs.

Rule discharged, with costs.

(a) 1 Bing. N. C. 71.

(b) Ante, Vol. 4, p. 730.

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SUMMERS v. JONES.

B. MONTAGUE had obtained a rule to shew cause why the bail-bond given by the defendant should not be delivered up to be cancelled, on the ground that the defendant had become bankrupt since the debt accrued, and had obtained his certificate. It appeared from the affidavits in answer to the rule that a commission had issued against the defendant in October, 1828, under which he was duly declared a bankrupt, and obtained his certificate; that in 1834 a fiat issued against him, and he afterwards obtained his certificate: another fiat issued in 1835, and under it he had also obtained his certificate. Under the first bankruptcy, he had paid but 8½*d.* in the pound, and nothing under the others.

Where a bankrupt obtained his certificate under a third commission, the Court refused to cancel a bail-bond given upon arrest for a debt proveable under that commission, he not having paid 15*s.* in the pound under either of the former commissions.

Cresswell shewed cause, and contended that the defendant was not entitled to be discharged out of custody, as he had not paid 15*s.* in the pound under either of the former commissions. He referred to *Fowler v. Coster* (a), and *Ex parte Robinson* (b).

B. Montague, in support of the rule, relied on the 126th section of the 6th Geo. 4, c. 16, which enacts, that if any bankrupt shall be arrested after his certificate shall have been allowed, he shall be discharged on common bail, and that the certificate shall be conclusive evidence of the trading, bankruptcy, commission, and other proceedings.

PARKE, B.—The defendant must plead his certificate specially in bar of the action, and then the plaintiff will be obliged to reply that the certificate is void; or he may plead the general plea of bankruptcy, and then the question will be open at nisi prius, and he can tender a bill of exceptions.

Rule discharged.

(a) 10 B. & C. 427.

(b) 1 Mon. & M'A. 44.

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EVANS v. CHESTER.

When a feme sole married before declaration, and the plaintiff nevertheless proceeded against her to final judgment and took her in execution, the Court refused to discharge her, it not being sworn that she had no separate property.

IN this case an action was commenced against the defendant whilst she was a feme sole, but before declaration she married. The plaintiff continued the action against her to final judgment, and took her in execution under a writ of *capias ad satisfaciendum*.

Dowling, upon an affidavit of these facts, moved to discharge her out of custody. The affidavit also stated that no settlement was made upon her on her marriage.

W. H. Watson shewed cause, and referred to *Cooper v. Hunchin (a)*.

PARKE, B.—The husband must be left to his writ of error. If both had been sued in this action, and execution had issued against both, she would not be entitled to be discharged on this affidavit, as she does not swear that she has no separate property, but only that no settlement was made on her marriage. The affidavit is defective in this respect, and the rule must be discharged with costs.

BOLLAND, ALDERSON, and GURNEY, Bs., concurred.

Rule discharged, with costs.

(a) 4 East, 521.

ROBINS v. BRIDGE.

Reported S. M. & N.

There is no implied contract with an attorney who subpoenas a witness, to pay the expenses occasioned by such subpoena.

THIS was an action to recover the expenses incurred by the plaintiff in attending as a witness at the Taunton assizes.

to pay the expenses occasioned by such subpoena.

It appeared that the plaintiff and defendant were both attornies, and that the latter, having a cause to try at the assizes, had sent to the plaintiff to procure him a copy of a commission of sewers, which was accordingly done. The defendant subsequently subpoenaed the plaintiff as a witness upon the trial, but no money was tendered, nor was there any agreement to pay his expenses; nor did it appear from the subpoena, or otherwise, whether the defendant was acting for the plaintiff or defendant in that suit. The whole sum claimed by the plaintiff was 21*l.*, and the defendant paid into Court 5*l.*, which covered the costs of procuring the commission of sewers. The learned Judge was of opinion that the defendant was not liable to pay the plaintiff's expenses occasioned by the subpoena, but left the question to the jury, with liberty to move to enter a nonsuit. The jury found a verdict for the plaintiff, 16*l.*

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Bompas, Serjt., having obtained a rule accordingly,

Erle and *Bere* shewed cause.—There are many instances in which an attorney may be personally liable to the party he employs, though acting only on behalf of his client. In *Scrace v. Whittington* (a), the attorney to a commission of bankrupt applied to the attorney of a mortgagee of premises, belonging to the bankrupt, to join in the sale of the mortgage premises. The mortgagee having consented, her attorney requested the bankrupt's attorney to prepare, on the part of the mortgagee, requisitions to the commissioners of bankrupts to ascertain the amount of principal and interest due upon the mortgage: the latter did so; and it was held that the mortgagee's attorney was liable to the bankrupt's attorney for the amount of business done. So, where the solicitor of the assignees of a bankrupt tenant, upon whose lands a distress had

(a) 2 B. & C. 11.

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been put by the landlord, gave a written undertaking, that they, "as solicitors" to the assignees, undertook to pay to the landlord his rent, provided it did not exceed the value of the effects distrained, it was held they were personally liable: *Burrell v. Jones* (a). If the solicitor under a commission of bankruptcy agree with the petitioning creditor to work the commission for a certain sum, and receive a part of that sum, he is liable to the messenger whom he nominates for his bill of fees: *Hartop v. Jukes* (b), and *Hart v. White* (c). A person who attends as a witness under a subpoena, but refuses to give evidence unless his expenses are paid, and on that account is not examined, may nevertheless maintain an action for his expenses against the party who subpoenaed him: *Hallet v. Mears* (d). [*Alderson*, B.—If a witness ask for his expenses and the attorney does not pay them, would he be liable to an action at the suit of his client?] It is apprehended he would. [*Lord Abinger*, C. B.—Suppose the client supplies the attorney with money to pay the expenses; if the money be not paid the witness might bring an action against the client, although he had given the money.] There are instances in which an attorney, by the known course of business, makes himself personally liable, as to the stationer for paper, copying briefs, &c. So a bailiff may maintain an action for his fees against the attorney who employs him, and he is not bound to look to the party in the cause: *Foster v. Blakelock* (e). It would be no hardship on the attorney to hold him liable, as he might always take means to protect himself, by obtaining money from his client. But where, as in this case, the attorney delivers the subpoena without expressing for which party it comes, he is in effect an agent who enters

(a) 3 B. & Al. 47.

(b) 2 M. & S. 438.

(c) Holt, 376.

(d) 13 East, 15.

(e) 5 B. & C. 328.

into a contract without naming his principal, and is personally liable: *Thomson v. Davenport* (a).

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Sir *W. Follett* and *Bompas*, Serjt., in support of the rule.—The defendant is not liable. The word “attorney” means one who represents another. In the early periods of the law they were unconnected with the Court. By the 33 Hen. 6, c. 6, a power was given to the judges to limit their number. The whole proceedings are in the name of the party, and the Courts have limited their responsibility by not permitting them to become bail. It is true that an attorney may make himself personally liable, as in the cases cited; but there, the question was, whether he did not intend to be responsible though he contracted as attorney. An attorney is paid for drawing the briefs, and he is responsible for all that is subsidiary to that purpose: he cannot charge for briefs and stationery too. He undertakes to provide for the means of receiving all that remuneration which the Court gives him. *Scrace v. Whittington* was decided upon the ground that it was the practice of one attorney to do business for another, and that the one who does the business universally gives credit to the attorney who employs him, and not to the client, for whose benefit it is done. If the law were as contended for on the other side, it would go to this extreme,—that if the party himself subpoenaed a witness the attorney would be liable. [*Parke*, B.—The person who gives the order to attend *prima facie* enters into the contract.] It is not necessary that the attorney should deliver the subpoena; it would be equally binding if left by any other person. In *Hallet v. Mears* there was some evidence of a promise to pay at the time of serving the subpoena. In *Hartop v. Jukes* the defendant by his contract made himself personally liable. *Collins v. Godefroy* (b) decided that an attorney

(a) 9 B. & C. 78. (b) 1 B. & Adol. 950; ante, Vol. 1, p. 326, S. C.

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who has attended as a witness in a civil suit, cannot maintain an action against the party who subpoenaed him, for compensation for loss of time. There is no distinction between the case of an attorney and any other agent. [Lord *Abinger*, C. B.—There is one material distinction, namely, that an attorney has a lien upon the judgment for his costs. *Parke*, B.—*Harris v. Osbourn* (a) decided that where a client employs an attorney to conduct a suit, it is an entire contract, to conduct the suit to its termination, and determinable by the attorney only on reasonable notice.]

Cur. adv. vult.

LORD ABINGER, C. B., now delivered the judgment of the Court.—The question in this case was, whether an attorney who caused a witness to be subpoenaed without an express contract to pay his expenses, is liable to an action at the suit of the witness for such expenses. The importance of the case has induced the Court to take time to consider their judgment. The case of *Smith v. Smith*, in which my brother *Parke*, before whom it was tried, nonsuited the plaintiff, was not brought before the Court in banc. In *Hallet v. Mears* (b), which was an action by a witness against the party who subpoenaed him, there was evidence of a promise by the defendant when the subpoena was served to pay the expenses. *Scrace v. Whittington* (c) and *Foster v. Blakelock* (d) were actions by one attorney against another, and in each of those cases there was evidence of a course of dealing from which a contract could be inferred. This is the first case in which the question has arisen, whether there is an implied contract by an attorney to pay the expenses of a witness when no money is tendered; and there is in this case a further

(a) 2 C. & M. 629.

(b) 13 East, 15.

(c) 2 B. & C. 11.

(d) 5 B. & C. 328.

question, whether the law would imply a contract on the part of the client to reimburse the attorney.

It is sufficient for the decision in this case to say, that there is no implied contract by the attorney. An attorney is clearly an agent, the name of whose principal is disclosed upon the subpoena; and according to the known maxim of law, an agent, the name of whose principal is disclosed, is not liable upon any contracts made by him as such agent, unless he thinks fit to bind himself. An attorney does not make his client liable upon contracts with which he may be charged. If he employ a stationer instead of his own clerk to copy briefs, that is merely employing an agent to do the business, for which he makes a charge. So also as to the paper which he may purchase. He may also be personally liable for the ordinary fees payable to the officer of the court; for it is implied when an action is brought that he will pay the fees, and the client cannot be presumed to have authorized him to pledge his credit where no credit is to be given. The known usage is that the officer does not receive his fee from the client, but from the attorney; and if the attorney be permitted to delay the payment of the fee, the officer looks to him and not to his client. No general inference can be drawn from the case of a witness, that he knows his testimony is required, and that if he should fail to attend without having an excuse, he is liable to the party who subpoenaed him under the 5th Eliz. c. 9, s. 12, and also at common law; for he may claim a reasonable sum for his expenses of attending to give evidence, and he may refuse to attend unless they are paid; and if he be unwilling to accept an undertaking from the party, he may waive his right and have an undertaking from the attorney. There seems, therefore, to be no reason to imply a contract by the agent where he has no interest, and can make no profit upon it in his charges to the principal. There must in every case be a credit to some extent for the balance, and I do not

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for one think that the attorney's liability ought to be extended. It is presumed that the party must be aware of the law that enables a witness to refuse to give evidence unless his expenses are paid, and if the client omit to furnish funds, he must be considered as authorizing the attorney to bind his credit. We are of opinion that there is no implied contract with the attorney, and that the rule for entering a nonsuit must be absolute.

Rule absolute.

*See Card v. Carr. 5 Dr. L. 509.
Henden v. Parrish. 6 C. B. 504.*

WRIGHT v. LAINSON and Another.

Reported also in 2 M. & N. 729.

In an action against the sheriff for a false return, the declaration alleging a seizure by the sheriff the plea of not guilty only puts in issue the fact of the sheriff having the money in his custody and making a false return.

CASE against the sheriff of Middlesex for a false return to a writ of fieri facias. The declaration stated that a judgment was obtained by the plaintiff in the Court of King's Bench against one J. Hayes for 200*l.* debt, and 3*l.* 5*s.* for damages; that plaintiff sued out a writ of fieri facias, directed to the sheriff of Middlesex, to levy of the goods and chattels of Hayes the debt and damages aforesaid, and to bring the money into Court immediately after the execution of the writ. It then alleged that the writ was indorsed to levy 78*l.* 2*s.* 6*d.*, and delivered to defendants as sheriff of Middlesex, by virtue of which writ the defendants, as such sheriff, seized and took in execution divers goods and chattels of Hayes of the value of the moneys indorsed upon the writ, and so directed to be levied as aforesaid; yet the defendants so being such sheriff as aforesaid, and not regarding their duty, but contriving to injure the plaintiff in that behalf, had not the money so levied, or any part thereof, in Court, according to the exigency of the said writ, but therein wholly failed and made default, and have not paid the said sum of 78*l.* 2*s.* 6*d.* or any part thereof to the plaintiff, and on the contrary thereof the defendants, after the said levy, to wit, on &c., *falsely and deceitfully returned* to the said Court of King's

Bench, upon the said writ, that the said Hayes had not any goods or chattels in the bailiwick of the said sheriff, whereof they the defendants could cause to be levied the debt and damages aforesaid or any part thereof. Plea—Not guilty.

At the trial before Lord *Abinger*, C. B., at the London Sittings after last Hilary Term, the plaintiff having proved his case, the defendants attempted to shew that the return was not false by proving the bankruptcy of Hayes before the execution of the *fieri facias*. It was objected on the part of the plaintiff, that this evidence was inadmissible, inasmuch as the falsehood of the return was not in issue under the plea of not guilty, but only the fact of the defendant having made the return. The learned Judge received the evidence, reserving to the plaintiff liberty to move to enter a verdict for himself. A verdict having been found for the defendant,

Bompas, Serjt., in Easter Term, moved accordingly (a).

Alexander, *Butt*, and *C. R. Kennedy*, shewed cause.—Evidence of the truth of the return is admissible under the plea of not guilty. The rule of H. T. 4 Will. 4, (IV. 1), provides, that “in actions on the case, the plea of not guilty shall operate as a denial only of the *breach of duty or wrongful act* alleged to have been committed by the defendant, and not of the facts stated in the *inducement*.” The question then is, what part of the declaration is to be considered as matter of *inducement*, and where does the *breach of duty* charged begin? The term “inducement” means only such introductory matter as is necessary to explain the cause of complaint. The plaintiff, in order to establish his complaint, must shew a duty imposed on the sheriff; and he does that by shewing the

(a) There was another point raised, as to whether an I. O. U. bearing date before the bankruptcy of a trader, was evidence of a petitioning creditor's debt. 2 Meeson & Welsby, 739.

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delivery of the writ to him. Here then the inducement ends with the allegation of the delivery of the writ to the sheriff. Every subsequent act done by the sheriff is either in furtherance or in breach of his duty. The present case may be illustrated by the example given of the rule as to actions against carriers; viz. that the plea of not guilty is to operate as a denial only of the loss or damage, but not of the receipt of the goods by the defendant, or the purpose for which they were received. So, in actions for an escape, it is to operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or *preliminary proceedings*. In that case, therefore, the *arrest* is intended to be traversable under the general issue, and upon the same principle is the seizure of the goods in this case. The term "preliminary proceedings" must mean all proceedings prior to the attaching of the breach of duty which forms the subject of complaint. The seizure of the goods is only one of several links in a chain of facts, all contributing to shew that the sheriff did not perform his duty. [*Parke, B.*—The delivery of the writ raises *some* duty in the sheriff, viz. to look for the goods of the defendant in his bailiwick, but it does not raise the particular duty here alleged, viz. to pay over the money. There are three stages of duty: first, upon the delivery of the writ, to look out for the goods; secondly, on finding them, to levy; thirdly, on levying, to pay over the proceeds. Would this declaration have been good if every thing about the *return* had been left out? If not, it shews the gist of the action is the *false return*: then not guilty must put in issue the *falsehood*.] The sheriff did in fact seize the goods of Hayes, though those goods were not available in consequence of the fiat of bankruptcy against him. A special plea of bankruptcy would have been bad, as amounting to the general issue. When the quality or nature of the act done is necessarily involved in the issue, the plea of not guilty puts in issue all the facts which are necessary to prove its quality or nature: *Lillie v.*

Price (a), Thomas v. Morgan (b), Cotton v. Brown (c), Spencer v. Dawson (d). In *Frankum v. Earl of Falmouth (e)*, the *fact* of the diversion of the water was the only thing in issue; but here the falsity and character of the return is involved; the falsity of the return is of the substance of the complaint, consequently the plea puts in issue all circumstances which go to shew whether it was false or not.

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Bompas, Serjt., and *Russell Gurney*, in support of the rule.—The defence was not admissible under the general issue. “Inducement” comprises everything that occurred before the wrongful act complained of. Here the wrongful act is not the act of seizure, but the not paying over the proceeds of the levy. It is an inducement so long as it is a performance of the duty, but a breach when that has been done which gives the right of action: as, in the examples given of the action for an escape, the default in not arresting clearly forms part of the preliminary proceedings mentioned in the rule, so here the levy is only matter of inducement. The plaintiff does not proceed for any breach of duty in not levying, but for a specific false return subsequent to the levy. The declaration would be sufficient if the word “falsely” were struck out: the falsehood of the return is involved in the averment that the sheriff seized and had in his possession goods of Hayes, but returned that he had none. It will be found that in all the cases in which the plea of not guilty puts in issue more than the mere wrongful act, there is no inducement in the sense above stated. In *Thomas v. Morgan*, which was an action for injury done to the plaintiff’s cattle by the defendant’s dogs, the scienter was involved in the issue, as parcel of the wrongful act charged. So, in *Spencer v. Dawson*, the wrongful act consisted in falsely warranting

(a) Ante, Vol. 5, p. 432.

(b) Ante, Vol. 4, p. 223.

(c) 3 Adol. & E. 312.

(d) 1 M. & Rob. 552.

(e) 2 Adol. & E. 452.

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as sound a horse which was in fact unsound, consequently the wrongful act involved both the warranty and the soundness. In *Cotton v. Brown*, which was an action for maliciously indicting the plaintiff without probable cause, *Patteson, J.*, says, : "Some cases have been referred to in which the plaintiff makes an assertion of right, and then complains of an injury done in respect of it; and there, it is proper for the defendant to answer by denying the right. But here, there is no such assertion of right; the whole matter alleged in the declaration is an act of injury." *Frankum v. Earl of Falmouth* is precisely in point. There the plaintiff declared that he was possessed of a mill, and by reason thereof was entitled to the use of a certain stream for the mill, and that the water ought to run and flow to the mill, and that the defendant *wrongfully and injuriously* diverted the same: the Court held that the only matter in issue was the fact of the diversion, and that the right to the use of the stream as claimed was admitted. There, unless the plaintiff's right to the watercourse was properly set out in the declaration, there was no wrongful act committed by the defendant's diversion of it. So here, the return is the breach of duty charged, and its wrongfulness depends upon the previous inducement. [*Parke, B.*—The question is, if the sheriff sells and does not pay over the money, would an action *on the case* lie against him without alleging a false return].

Cur. adv. vult.

Lord ABINGER, C. B., delivered the judgment of the Court.—This was an action against the sheriff for a false return, and the declaration stated that the plaintiff had obtained a judgment against a debtor, and had issued a writ of execution on that judgment, and placed it in the hands of the sheriff; that the sheriff had levied on the goods of the debtor, and received the money; and it then went on to charge the sheriff, that notwithstanding he had made the levy and received the money, he had made a false return

of nulla bona. There was the simple plea of not guilty. At the trial, my brother *Bompas* contended that the alleged return of nulla bona, and nothing else, was in issue; on the other hand it was contended, that the general issue gave the defendants an opportunity of shewing that they had not committed any breach of duty, for that they had not levied on the goods of the defendant in the original action, he having become a bankrupt. I was then disposed to agree in that interpretation of the new rule; but as it was the first case in which the point had arisen on a question of that nature, I saved the point for the plaintiff, and agreed to go into the case. Accordingly, the case has been argued before the Court, and we have all come to an opinion, on a full consideration of the new rules, that the only matter in issue upon the plea of not guilty is the fact of the sheriff having the money in his custody, and his making a false return; and therefore we think the verdict ought to be entered for the plaintiff. The rule is, that "in all actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement." The question is, what does *inducement* mean? We are of opinion, that, according to the terms of the rule, every thing is included in it, which does not involve the specific charge of a breach of duty. Now it cannot be said that the sheriff committed a breach of duty in executing the writ, for the declaration alleges that he did execute it on the goods of the debtor, and that by that process he obtained the price of the goods, equal to the debt demanded; but then comes the breach of duty, viz. that he neglected to bring the money into Court, but returned falsely that there were no goods of the debtor in his bailiwick. The breach of duty then consists of two parts: first, of the fact of his not having the money ready; and, secondly, his making such a return. A doubt occurred to me at the trial, whether the plea of not guilty

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was not confined merely to that part of the return which was matter of record; but, upon consideration, I think it involves matter of fact as well as matter of record, which matter of fact (the sheriff's having the money ready to deliver) and matter of record, being bound up together in a single issue, must go to the jury, as is the case wherever law and fact are blended together. We think, therefore, the plaintiff is entitled to a verdict; but as this is the first time the question has arisen, the Court are disposed to allow the defendant a new trial, upon payment of costs, with liberty to amend his plea.

Rule absolute accordingly.

In an action against the sheriff for a false return of nulla bona, the defence being the bankruptcy of the debtor, the Court refused to allow the defendant to plead two pleas, one traversing the seizure of the goods of the debtor, and another setting forth the dates of the act of bankruptcy and of the fiat of the defendant in the original action.

Butt subsequently moved for leave to add a plea traversing the averment in the declaration, that the defendants seized the goods of Hayes (the bankrupt), and also a plea disclosing the dates of the act of bankruptcy and of the issuing of the fiat: the act of bankruptcy was before the seizure, but the fiat did not issue until after; it was therefore doubtful whether the proposed defence was available under the first plea.

LORD ABINGER, C. B.—At the time of the seizure the goods belonged to the assignees by relation to the time when the act of bankruptcy was committed, although the fiat did not issue until after the seizure. To prove the shorter plea, you must prove the trading, the petitioning creditor's debt, and an act of bankruptcy before the date of the levy.

ALDERSON, B.—If these two pleas were allowed, it would be introducing all the evil of double pleading, which the new rules were intended to prevent. You may take which of them you choose.

Motion refused.

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LE FEVRE v. MOLINEUX.

R. v. RICHARDS shewed cause against a rule obtained by *James* for setting aside an interlocutory judgment for irregularity. It appeared that on the 5th of September, the time for pleading having expired, an order was made by Mr. Justice *Williams*, "that the defendant should have a month's further time to plead, taking short notice of trial, if necessary, for the first sittings in term." Judgment was signed for want of a plea upon the 31st of October. *Richards* contended that the judgment was regular, inasmuch as, if the time for pleading did not begin to run until after the 24th of October, it was impossible that the plaintiff could try the cause at the first sittings in term.

On the 5th September, the defendant obtained a month's further time to plead, taking short notice of trial for the first sittings in term:—*Held*, that, nevertheless, the enlarged time did not commence until after the 24th October.

LORD ABINGER, C. B.—The question has been decided in *Trinder v. Smedley* (a). It is true, that, if the defendant was not bound to plead until after the 24th of October, the plaintiff could not try at the first sittings in term; but I apprehend the meaning of the learned Judge was, that at all events the defendant was to take short notice of trial. I think the time for pleading did not commence until after the 24th of October, and therefore the rule must be absolute to set aside the judgment, without costs.

PARKE, B.—I think the time between the 10th of August and 24th of October ought to be excluded.

ALDERSON, B., concurred.

Rule absolute.

(a) Ante, Vol. 3, p. 87.

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Where issue is joined in a country cause in Easter Term, and no notice of trial has been given, it is too soon to move for judgment as in case of a nonsuit in the following Michaelmas Term.

SMITH v. MILLER.

BAYLEY shewed cause against a rule obtained by *Wightman* for judgment as in case of a nonsuit. It was a country cause, and issue was joined in Easter Term last, but no notice of trial was given. He contended that the application was too early, and referred to *Gough v. White (a)*.

Wightman, in support of the rule, cited *Robinson v. Taylor (b)*, in which it was held, that, where issue was joined in a country cause in Easter vacation, but no notice of trial was given, judgment as in case of a nonsuit might be moved for in the following Michaelmas Term.

LORD ABINGER, C. B.—I always understood the practice to be, that, when a party has not given notice of trial, he is at liberty, in a town cause, to have two opportunities of going to trial before a motion can be made for judgment as in case of a nonsuit; and, upon the same principle, in a country cause, two Assizes must elapse. The motion should not have been made until the second Assize had passed.

PARKE, B.—According to the former practice, the application is too soon; and *Gough v. White* has made no alteration.

ALDERSON, B.—It is desirable to have one general rule in cases in which no notice of trial had been given; otherwise there would be one rule for the sheriffs' courts, and another for the superior courts. It has been decided, that, in a case to be tried before the sheriff, the motion for judgment as in case of a nonsuit cannot be made until after the expiration of two terms.

Rule discharged, with costs.

(a) Ante, Vol. 5, p. 585, n.

(b) Ante, Vol. 5, p. 518.

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WIGHTMAN obtained a rule to shew cause why the Master should not disallow the plaintiff his costs of the action, and why the plaintiff should not pay the defendant his costs, or why the plaintiff's proceedings should not be set aside, and why the plaintiff should not pay the costs of this application. It appeared that the plaintiff, an apothecary, had attended an adult daughter of the defendant, who did not reside with him, and his bill for such attendance amounted to 18*l.* 19*s.* 6*d.* The plaintiff had also attended a servant of the defendant, and had delivered a distinct bill for such claim, amounting to 1*l.* 0*s.* 6*d.* This latter claim was not disputed by the defendant, but the former, he contended, he was not liable to pay. On the 15th October, 1836, the plaintiff issued a writ, indorsed 18*l.* 19*s.* 6*d.*, and on the 25th November following a declaration was delivered, and particulars of demand, by which the plaintiff claimed not only the 18*l.* 19*s.* 6*d.*, but also the 1*l.* 0*s.* 6*d.* The defendant pleaded non-assumpsit, except as to 1*l.* 0*s.* 6*d.*, and payment of that sum into Court. The plaintiff replied by accepting that sum in full satisfaction and discharge. The defendant resided within the liberty of a local court for the recovery of debts under 40*s.* *Wightman* submitted, that, as the two accounts were kept distinct, and the plaintiff having by his writ claimed only one of them, the defendant naturally supposed that he was suing only for the disputed account, and that he ought not, by inserting the 1*l.* 0*s.* 6*d.* in his particular, to render the defendant liable for costs. If the 1*l.* 0*s.* 6*d.* had been included in the amount claimed on the writ, the defendant might have taken out a summons to stay proceedings on payment of that sum; but by omitting it in the first instance, and afterwards inserting it in his particular, the defendant had

The plaintiff, an apothecary, attended defendant's daughter, who did not reside with him, and his bill for such attendance amounted to 18*l.* 19*s.* 6*d.* The plaintiff also attended defendant's servant, and had delivered for such attendance a distinct bill, amounting to 1*l.* 0*s.* 6*d.* The plaintiff sued out a writ, indorsed 18*l.* 19*s.* 6*d.*; but, when he declared, inserted in his particulars his other claim of 1*l.* 0*s.* 6*d.*; The defendant paid this latter amount into court, which the plaintiff took out in satisfaction. The defendant resided within the limits of a local court for the recovery of debts to the amount of 40*s.*: —*Held*, that, as the plaintiff had misled the defendant by the indorsement, he was not entitled to costs.

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been misled, and a species of fraud was practised upon him.

R. Alexander shewed cause upon an affidavit, stating that the plaintiff considered the defendant liable for both debts, but no reason was given for not prosecuting the action for the 18*l.* 19*s.* 6*d.* He contended, that, as the defendant had not tendered the 1*l.* 0*s.* 6*d.* before action brought, but had paid it into Court generally, the plaintiff was clearly entitled to the costs of the action.

Per CURIAM.—The plaintiff has taken out of Court a sum which he did not claim by his writ, and now, without giving any reason for it, abandons altogether the only claim to which the writ applied. By confining the indorsement to 18*l.* 19*s.* 6*d.*, he induced the defendant to suppose that he was not suing for the 1*l.* 0*s.* 6*d.*, and thereby precluded him from taking out a summons to stay proceedings upon the payment of that sum, without costs, which he would have been entitled to do, it being under 40*s.* Had such a summons been taken out, and opposed by the plaintiff on the ground that he claimed a larger sum, an indorsement to that effect would have been made upon the summons, and the defendant would have been entitled to his costs subsequently to the summons. The rule for disallowing the plaintiff his costs of the action must be made absolute; but, as the defendant has not placed himself in a situation to ask for his costs of the action, that part of the rule must be discharged, and consequently he cannot have the costs of this application.

Rule accordingly.

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WARNE v. BERESFORD.

DEBT for goods sold delivered. Plea, that plaintiff commenced his action against the defendant after the making of a certain act of Parliament, made in the 23rd year of the reign of our late Sovereign Lord George the Second, late King of Great Britain, intituled "An Act for the more easy and speedy recovery of small debts within the city and liberty of Westminster and that part of the duchy of Lancaster which adjoineth thereto;" and that, at the time of the commencement of the said action, he, the defendant, was an inhabitant and resident within the said city and liberty of Westminster, and then was and still is liable to be warned or summoned before the Court of Requests in the said act mentioned. And the defendant further saith, that he was not at the time of the commencement of such action indebted to the plaintiff in any sum or sums of money amounting to the sum of 40*s*. Replication, that the defendant, at the time of the commencement of the said action, was indebted to the plaintiff, upon and by virtue of the cause of action in the declaration mentioned, in a larger sum than 40*s*., modo et formâ; upon which issue was joined, and a verdict found for the defendant.

After plea pleaded, and before trial, the 23 Geo. 2, c. xxvii. was repealed by the 6 & 7 Will. 4, c. cxxxvii. (a),

To debt for goods sold, the defendant pleaded the Westminster Court of Requests' Act. After plea, and before trial, that act was repealed by another, which contained no provision respecting actions then pending. A verdict having been found for the defendant: *Held*, that the plaintiff was entitled to judgment non obstante verdicto.

(a) Section 37 enacts, "That it shall be lawful for the said commissioners, and they are hereby empowered and enabled to decide and determine all disputes and differences between party and party for any sum of money not exceeding *five pounds*, in all actions or causes of debt, except as hereinafter is mentioned."

Sect. 38. "Provided always, and be it further enacted, that nothing

in this act contained shall extend or be construed to extend, so as to enable the said court to entertain or determine any dispute or difference whatsoever, in respect of any act done in execution or discharge of any public office or employ, or in respect of any liability or supposed liability implied in or inferred from the holding of such office or employment, or arising therefrom, or in conse-

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which contains no provision respecting actions then pending. A rule having been obtained by *Wightman* to enter up judgment for the plaintiff non obstante veredicto—

Payne shewed cause.—The plea tendered a material issue at the time it was pleaded, and cannot be rendered bad by a subsequent repeal of the statute upon which it was framed. There is a distinction between the case of a repealed statute, which is intended to afford a *protection* to a party, and of one which operates in the nature of a penalty. In *Charington v. Meatheringham (a)*, a statute which gave treble costs on nonsuit to parties sued for any thing done in pursuance of that act, was re-

quence thereof, or to determine the right or title to any lands, tenements, or hereditaments, or real estates whatsoever, or to judge, determine, or decide on any debt, where the title of the freehold or lease for years, not being a lease by parol, of any lands, tenements, or hereditaments, or of any chattels real whatsoever, shall be brought or come in question, or for any sum being the balance of any account originally exceeding five pounds, except as herein-after mentioned, nor to any other debt which shall arise by reason of any cause concerning testament or matrimony, or any thing concerning or properly belonging to the Ecclesiastical Court, or for or concerning any agreement by way of compensation by or by way of retainer of tithes, or for or by reason of any bye-law, or to any debt for tolls or customs due to any corporation or company, or in anywise relating to the fran-

chises, privileges, or chartered rights of any other bodies politic or corporate, or any premium on any policy of insurance."

Sect. 86. "And be it further enacted, that no action or suit for any debt not exceeding the sum of forty shillings, and recoverable by virtue of this act in the said Court of Requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof in any other court whatsoever: Provided always, that nothing herein contained shall destroy, limit, or prejudice the jurisdiction of his Majesty's courts of record at Westminster, or other courts, in cases wherein the debt shall exceed the sum of forty shillings; but the said courts respectively shall have the same powers, privileges, and jurisdiction as they had before the passing of this act."

(a) Ante, Vol. 5, p. 464.

pealed by a statute which gave in such case costs only as between attorney and client. The nonsuit took place before the repealing statute came into operation; but judgment was not signed until after; and there it was held the Court had no power to award treble costs, Lord *Abinger*, C. B., observing, that the costs were in the nature of a penalty, and although it might be true that a party retained his right to the protection afforded him by the repealed statute, it did not follow the same principle extended to a penalty. It is for that reason that a party has not been allowed to enter a suggestion upon a repealed statute; but here, the defendant is seeking the protection of the act, and not to enforce a penalty.

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ALDERSON, B.—The issue raised upon this record is as to the amount only: that is in effect a suggestion which brings the case within those already decided. But I apprehend the real question is, upon the facts found upon this record—what must be the judgment of the Court according to the law now in existence? The rule must be absolute.

BOLLAND, B., and GURNEY, B., concurred.

Rule absolute.

RAWLINS v. TILL and Another.

TRESPASS.—The declaration stated that the defendants, on &c., with force and arms &c., assaulted the plaintiff, and *then seized and laid hold* of the plaintiff, and forced and compelled him to go along divers public streets to a certain house, and there imprisoned the plaintiff, and

The declaration stated that the defendant assaulted the plaintiff, and *seized and laid hold of him*, and imprisoned him. The defendant

pleaded the general issue, and a justification to the whole. A verdict was found for the plaintiff, with one shilling damages, and the Judge certified under the 43 Eliz.:—*Held*, that the plea of justification admitted a battery, and that the plaintiff was entitled to costs, notwithstanding the Judge's certificate.

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kept and detained him in prison, &c. Pleas: first, Not guilty; secondly, a justification under a writ of *capias* by one defendant as sheriff, and the other acting in his aid. Replication, *de injuriâ*.

The cause was tried before Lord *Abinger*, C. B., at the sittings after Trinity Term, when a verdict was found for the plaintiff, with one shilling damages, and the learned Judge certified under the 43 Eliz. c. 6, s. 2.

Humfrey obtained a rule to tax the plaintiff his costs, notwithstanding the Judge's certificate, on the ground that there appeared by the pleadings to have been a battery.

Bompas, Serjt., and *Hoggins*, shewed cause.—In order to make out a battery there should be the term "beat," and not merely a touching and imprisonment. An imprisonment does not necessarily include a battery. In *Emmett v. Lyne* (a), the plaintiff declared for an assault, battery, and imprisonment, and no battery was proved, but only an imprisonment, and it was held the judge had power to certify under the 43 Eliz. c. 6. In *Wiffin v. Kincard* (b), the Court were clearly of opinion that a touch given by a constable's staff, in order to engage the plaintiff's attention, did not amount to a battery: but there was some doubt whether a taking by the collar did not; Sir *J. Mansfield*, C. J., saying, that taking the plaintiff by the collar without any improper violence, though an imprisonment, was no battery, which is a beating; and *Chambre*, J., saying that imposition of hands, in order to imprison, is a battery. The Court, however, agreed, that, whether the evidence amounted to proof of a battery or not, it would not prevent the Judge from certifying with respect to the imprisonment under the 43 Eliz., and that the plaintiff was not entitled to his full costs for the assault and battery, unless the

(a) 1 New Rep. 255.

(b) 2 New Rep. 471.

Judge certified under the 22 & 23 Car. 2; and no such certificate had been granted: and, with respect to the imprisonment to which the 43 Eliz. applied, a certificate had been granted under that statute, by which the plaintiff was deprived of his costs. [*Parke, B.*—In 2 Roll. Ab 546, s. 7, cited in Comyns's Digest, title Battery, it is said, if a man comes in aid of an officer, who has a warrant against A., and lays his hand upon A., and says to the officer, "This is the man," that is a battery.] At one time this doctrine was carried to a great extent, and the mere closing a door against a person was considered a battery; but it is submitted that, if there is no intention to strike a person, the mere laying hold of him to take him away would not necessarily be a battery, but only an imprisonment. [*Alderson, B.*—If the impositio manûm be not a battery, why do you justify it? *Parke, B.*—The plea of justification admits the words in the declaration, in the sense in which it would be necessary to prove them, in order to support the action. The question is, whether the seizing and laying hold is not such a seizure as necessarily to constrain his person, if so, that is a battery. In Comyns's Digest (a), it is said to be a battery if a man hold another by the arm.]

Humfrey, contra, was stopped by the Court, who said the rule must be absolute.

Rule absolute (b).

(a) Tit. Battery.

Ib. p. 621; and *Wilson v. Lainson*,

(b) See *Hughes v. Hughes*, ante, Vol. 4, p. 532; *Smith v. Edwards*,

ante, Vol. 5, p. 339.

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DRURY v. DAVENPORT.

Where a copy of a writ of summons commenced "William the Fourth," instead of "Victoria," the Court set aside the service.

THOMAS had obtained a rule nisi to set aside the service of a writ of summons for irregularity. The objection was, that the copy served commenced "William the Fourth," &c., instead of "Victoria," &c. It did not appear whether or not the writ itself was correct.

Wightman shewed cause.—The copy of the writ is tested in the name of the Chief Baron, and is perfectly correct in all other respects; it could not mislead the defendant. In *Elvin v. Drummond* (a), which was decided in the eighth of Geo. 4, the plaintiff, in an action against the sheriff for an escape, alleged in the declaration, that he sued out a writ *of the king* called a ca. sa. The writ given in evidence was in the name of George the Third, but the Court were clear that the writ being tested in the name of the present Chief Justice, and being indorsed with the proper date, there was no material variance. [*Parke, B.*—That case was decided before the new statute, which gives a particular form.] The form given by the statute is in the *king's* name, not the queen's. Besides, the statute does not alter the law or practice.

PARKE, B.—Since the statute we have always held it necessary to be strict. The rule must be absolute, with costs.

Rule absolute.

(a) 4 Bing. 278; 1 M. & P. 88.

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FARR v. WARD.

ASSUMPSIT for cattle and goods sold and delivered. The only material plea was, that the defendant had given a bill of exchange for the amount of the debt, which the plaintiff had accepted in satisfaction. At the trial before *Gurney*, B., at the last Assizes for the county of Carmarthen, it appeared that the plaintiff had sold cattle to the defendant, to the amount of 25*l.*, and that 3*l.* was paid down, and it was agreed that a bill at two months should be given for the residue. The question in the cause was, whether the bill of exchange had ever been in the possession of the plaintiff, or whether it had not been abstracted from the post-office by one Jenkins, and circulated by him. The jury found that the bill had been abstracted by Jenkins. The plaintiff claimed interest on the amount for which the bill was drawn, from the time when it would have become due, and the learned Judge directed the jury that he was entitled to recover, and a verdict was found accordingly.

Where goods are sold, to be paid for by a bill, which is in fact never given, the plaintiff may, under the count for goods sold and delivered, recover interest for the amount from the time when the bill would have become due.

Evans now moved, by leave of the learned Judge, to reduce the damages to 220*l.*, the amount of the principal sum remaining unpaid. There was no notice to entitle the plaintiff to claim interest under the 3 & 4 Will. 4, c. 42, s. 8, and the question therefore was, whether he had any right to it independently of that statute. In *Foster v. Weston* (a), the defendants bound themselves by deed to pay 1500*l.*, to be delivered to R. D., in goods, by three payments of 500*l.* each, at three, five, and seven months; and it was held that the instrument did not carry interest.

PARKE, B.—*Marshall v. Poole* (b) is a direct authority in favour of the plaintiff. There the Court held, that,

(a) 6 Bing. 709 ; 4 M. & P. 589.

(b) 13 East, 98.

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where goods are sold and delivered, upon an agreement by the vendee to pay for them by a bill at a certain date, as interest would have run upon such bill if given, it may be recovered in an action for the price of the goods, brought after the time when such bill would have become due; and it may be recovered as part of the estimated value of the goods, upon the common count for goods sold and delivered.

Rule refused.

REGINA v. Sheriff of MIDDLESEX, in the case of DIGNAM
v. REITTER.

A body rule expired on the 20th at 11 o'clock; on the 17th, notice of justification was given for the 20th, but served after 11 o'clock. The bail attended accordingly, and the Judge made an order that they should have "three days' further time to justify," without prejudice to the question as to the sheriff being in contempt:—*Held*, that the meaning of the order was, "without prejudice to the sheriff being in contempt at the time of making the order;" and as the sheriff had the whole of the 20th to bring in the body, the Court set aside an attachment subsequently granted against him, for irregularity.

HUMFREY had obtained a rule to set aside an attachment against the sheriff, for irregularity. The sheriff had been ruled by a Judge's order to bring in the body, which rule expired on the 20th July, at eleven o'clock. On the 17th, a notice of justification of bail was given for the 20th, but was not served until after eleven o'clock. The bail attended on the 20th, when an objection was taken that the notice of justification was too late. The learned Judge made an order "that the bail have three days further time to justify in the action, without prejudice to the question as to the sheriff being in contempt." On the 24th the bail justified accordingly.

Petersdorff shewed cause.—The rule of H. T. 4 Will. 4 orders, that, in case aailable writ shall expire in vacation, and the sheriff return cepi corpus thereon, a Judge may, by order, require the sheriff to bring in the body, by putting in and perfecting bail to the action in the like number of days as the practice requires with respect to

bringing in the body in term. As soon, therefore, as the bail were unable to justify, the sheriff was in contempt, and the Judge's order, having been made without prejudice to the sheriff's liability, cannot affect the case. The contempt was not purged by the subsequent justification, but the sheriff still remained liable to an attachment: *Rex v. Sheriff of Middlesex (a)*.

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Humfrey, in support of the rule.—The sheriff had the whole of the 20th to justify bail, and therefore he was not in contempt at the time the order was made. [*Parke*, B.—Here the time was given without prejudice, and the sheriff would be in contempt, because he could not justify upon the 20th, not having given notice.] The bail had three days further time to justify, without prejudice to the question of the sheriff being in contempt *at the time*. [*Parke*, B.—If the order is to be construed without prejudice to the question of the sheriff being *now* in contempt, your argument is right.] If it were not so, the order would have been an injury to the defendant, as he might otherwise have brought in the body before the evening of the 20th.

PARKE, B.—The Court are of opinion that the true meaning of the order is, that it shall be without prejudice to the sheriff's being in contempt at the time of making the order. If this construction be right, it was unnecessary to insert any such clause in the order, but it may have been introduced *pro majori cautela*. If the word *now* had been inserted, it would have removed all the difficulty. I own I thought differently at first; but, as the rest of the Court are of that opinion, I do not mean to dissent.

ALDERSON, B. — Probably the argument before the

(b) Ante, Vol. 3, p. 438.

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learned Judge was, that the sheriff was in contempt by the rejection of the bail. The Judge then says, I will give you further time, without prejudice to the question. That question has now been argued, and the Court think the sheriff was not then in contempt.

BOLLAND and GURNEY, Bs., concurred.

Rule absolute.

See Cooper v. Barber. 29. L.J. Rep. 141.

DOE d. POSTLETHWAITE v. NEALE.

L.C. 2. H.D. 722.

Where a plaintiff discontinues before he has given notice of trial, the defendant is, under no circumstances, entitled to the costs of preparing briefs.

THE defendant Neale having obtained a verdict in an action of ejectment against Postlethwaite, the latter afterwards brought an ejectment against Neale to recover possession of the same premises. The plaintiff, having been ruled to reply, delivered a replication, but gave no notice of trial, and subsequently discontinued. The Master, on taxation, allowed the defendant the costs of instructions for briefs and draft briefs, but refused to allow the copies of briefs.

Chilton, for the lessor of the plaintiff, and *Wightman*, for the defendant, obtained cross rules for a review of the taxation.—It appeared from the affidavits that the premises in question were situate near Ulverston, in Lancashire; that the defendant's witnesses, who were very numerous, resided in Westmoreland, Cumberland, and Lancaster; and that the defendant and his attorney resided at Billericay, in Essex. The briefs had been all copied before the last day for giving notice of trial for the Spring Assizes, which was the 11th of March, the commission day at Lancaster being the 21st. If notice of trial had been given on the 11th, the defendant would not have received it by post until the 14th, and he could not have

arrived at Lancaster until the 16th, leaving only four days to prepare for trial, one of which was Sunday.

Wightman, for the defendant, contended, that, under all the circumstances, the attorney was well justified in preparing his briefs before the time of notice of trial expired.

Chilton urged, that the universal practice was to disallow the costs of preparing briefs when no notice of trial had been given.

The Master stated that he recollected no other instance in which the drafts had been allowed where no notice of trial had been given.

PARKE, B.—It is better to adhere to the strict practice. As to the copies, there is certainly no ground whatever for asking for them.

The lessor of the plaintiff's rule absolute ;
the defendant's rule discharged, with
costs.

NICHOL v. WILLIAMS.

ASSUMPSIT.—The declaration stated the defendant to be indebted to the plaintiff in the sum of 105*l.* for the use and occupation of a farm and lands of the plaintiff. The particulars of demand were as follows:—This action

In an action for use and occupation, the particulars claimed "52*l.* 10*s.*, being the balance of one year's rent."

The defendant pleaded, as to all but 52*l.* 10*s.*, non-assumpsit; and as to 52*l.* 10*s.*, payment. The plaintiff took issue upon the plea of non-assumpsit, and entered a nolle prosequi as to the plea of payment. At the trial, the plaintiff proved an occupation for three half-years, at a rent of 105*l.* a year; the defendant proved payment of all the rent:—*Held*, that the plaintiff was entitled to a verdict for nominal damages—the plea of payment only going to *part* of the demand.

In such cases, the declaration should either aver a part payment, or state the real amount which the plaintiff seeks to recover.

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is brought to recover payment of the sum of 52*l.* 10*s.*, being *the balance for one year's rent* due from the defendant for the occupation of a farm and lands of the plaintiff, situate at Boverton, in the parish of &c., which the defendant quitted on or about the 2nd day of February, 1833. The defendant pleaded—first, as to all but 52*l.* 10*s.* parcel &c., non-assumpsit; secondly, as to 52*l.* 10*s.* residue &c., payment before action brought. The plaintiff took issue upon the plea of non-assumpsit, and entered a nolle prosequi as to the plea of payment. At the trial, before *Coleridge, J.*, at the last Assizes for Glamorganshire, the plaintiff proved the occupation of the farm by the defendant for three half-years, and the defendant produced receipts for rent covering that period. It was objected, that, as the plea of payment went to part of the demand only, such evidence was not admissible in bar of the residue, but merely in mitigation of damages. The learned Judge directed a verdict for the defendant, reserving to the plaintiff liberty to move to enter a verdict for nominal damages.

E. V. Williams having obtained a rule accordingly,

Chilton and *Leach* shewed cause.—The plaintiff is confined in his proof to the amount demanded in his particular: *Colson v. Selby* (a), *Macarthy v. Smith* (b), *Duncan v. Hill* (c): and, as the plea of payment, which the plaintiff has confessed, covers that amount, the defendant is entitled to a verdict. [*Alderson, B.*—According to that, there was no necessity to plead the general issue at all. You should have pleaded payment of everything.] If the general issue had been omitted, the pleadings would have been bad, as not answering the whole declaration. In

(a) 1 Esp. 452.

(b) 8 Bing. 145.

(c) 2 B. & B. 684.

Coates v. Stevens (a), it appeared by the particular that the action was brought to recover the sum of 30*l.*, the balance of an account of 40*l.*, and the Court there thought it was unnecessary to plead payment of the 10*l.*, as that was admitted by the particulars. It is true that in *Ernest v. Brown* (b), the Court of Common Pleas held that a defendant must plead payment of a sum admitted in the particulars to have been paid, but a distinction was there drawn between assumpsit and debt, and the Court say that as the defendant had pleaded that he "*never*" was indebted, the only mode in which he could be entitled to a verdict on that issue was by shewing that the debt never did exist.

The Court then called upon

E. V. Williams and *Nicholl*, in support of the rule. Under the plea of non-assumpsit it was not competent for the defendant to shew payment in answer to the action, but only in mitigation of damages. Suppose the plaintiff declared for 100*l.* for goods sold, and gave credit in his particulars for 50*l.* paid on account; if goods to the amount of 50*l.* had been sold to the defendant and paid for, and another 50*l.* worth had been sold to a party as to whom there was a doubt whether or no he was the lawfully authorised agent of the defendant, and the defendant plead as to 50*l.* payment, and as to the residue non-assumpsit, and the plaintiff enters a nolle prosequi as to the 50*l.* of which payment is pleaded; would the plaintiff be restricted to the 50*l.*, the payment of which had been pleaded? In such a case the plaintiff could not new assign, as he would be unable to prove a third sum of 50*l.*; and besides, a new assignment is inapplicable, unless the plea assumes to answer the whole declaration: 1 Saund. 299. a, n. (b), Bull, N. P. 17,

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(a) Ante, Vol. 3, p. 784; 2 C. M. & R. 118.

(b) Ante, Vol. 5, p. 637; 4 Scott, p. 385.

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Barnes v. Hunt (a), *Hall v. Middleton* (b). According to the decision of *Ernest v. Brown*, the defendant was bound to plead payment of the 52*l.* 10*s.* for which the plaintiff had given him credit. It is difficult to see any distinction between debt and assumpsit: the pleas of *nunquam indebtedatus* and *non-assumpsit* equally negative the existence of the facts from which the liability arises. It would be inconvenient to establish a rule which would make the particulars an exposition of the record, as the particulars may frequently be altered. Besides, the plaintiff need not rely upon *Ernest v. Brown*, because here, the defendant, having an opportunity of pleading payment to the whole record, has neglected to do so. [*Parke, B.*—Should not the plaintiff have declared for 52*l.* 10*s.* only?] It is admitted that he ought; but he has been driven to enter a *nolle prosequi* by the defendant's mode of pleading. [*Alderson, B.*—You say the declaration is as if the plaintiff said, I go for 105*l.*, of which I admit I have received 52*l.* 10*s.* But the real question is, whether there was any thing to try. If you strike the 52*l.* 10*s.* out of the declaration, it is as if there was *as to nothing*, *non-assumpsit*.] The particulars are clearly no part of the record: *Meager v. Smith* (c), *Booth v. Howard* (d).

Cur. adv. vult.

PARKE, B.—The plaintiff in this case declared for use and occupation, stating the defendant to be indebted in the sum of 105*l.* Before declaration, the defendant applied for particulars of the plaintiff's demand, which were accordingly given in this form: "The plaintiff seeks to recover in this action the sum of 52*l.* 10*s.*, being the balance of one year's rent," &c. The year's rent being admitted to

(a) 11 East, 451.

Vol. 5, p. 438.

(b) 4 Adol. & E. 107.

(d) Ante, Vol. 5, p. 438.

(c) 4 B. & Adol. 673; Ante,

be 105*l.*, the particular is equivalent to a statement that the plaintiff proceeds for 52*l.* 10*s.*, half a year's rent, the other half year's rent being paid. The defendant pleaded, as to all but 52*l.* 10*s.*, non assumpsit, and as to the 52*l.* 10*s.* residue, payment. The plaintiff joined issue on the plea of non assumpsit, and entered a nolle prosequi as to the plea of payment. On the trial before my brother *Cole-ridge*, the plaintiff went into his case; the defendant produced his evidence on the question, whether the whole year's rent was paid or not, and the learned judge intimated his opinion, that it was, and directed a verdict for the defendant; but reserved liberty to the plaintiff's counsel to move to enter a verdict for nominal damages. In the course of the discussion, the particulars annexed to the record were referred to by the defendant's counsel, but he did not use them in the early part of the case to confine the plaintiff as to proof. A rule nisi having been obtained to enter a verdict pursuant to the leave reserved, the question now is, whether it ought to be made absolute. We are of opinion that it ought. The whole question turns upon the true construction of the particulars and pleadings in this case taken together. The particulars were given before the declaration; but as they were never amended, they must stand as if they had been delivered with the declaration, or afterwards. These particulars in substance admit the payment of 52*l.* 10*s.*, a half year's rent; and the question is, whether the plea of payment of 52*l.* 10*s.*, refers to the sum so admitted, or to the balance which the plaintiff seeks to recover. If the defendant had understood, at the time of the trial, that it referred to the latter, he would naturally have instructed his counsel to insist (which he did not) on restricting the plaintiff to go into any proof at all, for in that view of the case there would have been no question to try after the plaintiff had admitted payment. On the other hand, unless he meant, at the time of pleading, to apply the plea of payment to the

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52*l.* 10*s.* in question, he would have pleaded improperly with a view to his intended defence. We have a difficulty in saying what the defendant intended ; but we must construe the plea as we think it would have been understood by the plaintiff or any other person. Now if it was optional in the defendant to use the particulars or not on the trial, to restrain the plaintiff, the plaintiff could not tell whether they would be so used ; and finding the plea of payment of 52*l.* 10*s.* a *part* of the demand, and knowing that such amount had been paid, he could not safely take any other course than to admit the plea of payment ; he could not act upon the plea as having any other meaning than a plea of part payment of the demand. In that sense we think the plea must be understood. And if the recent decision of the Court of Common Pleas, in *Ernest v. Brown*, be right, that the defendant could not have availed himself of the part payment admitted in the particulars by restraining the plaintiff in point of evidence, and must have pleaded part payment, there can be no question as to the meaning of the plea. We do not, however, feel it necessary to decide whether the defendant was bound to plead payment after such a particular as this or not ; for we think, without relying on that case, we must construe the plea as intended to apply to the payment admitted. To avoid similar questions in future, the obvious course which ought to be pursued in the like cases, is, for the plaintiff to adopt the mode of declaring, which we have been informed is now not unfrequent, to aver the part payment in the declaration, or to insert in the declaration the real amount which the plaintiff seeks to recover. We are of opinion that the rule must be made absolute.

Rule absolute.

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DAVIES v. LLOYD.

R. V. RICHARDS obtained a rule nisi, to set aside a writ of summons, on the ground that there was no indorsement thereon of the amount of debt and costs, although it appeared, on the face of the writ, that it was sued out in an action of debt.

It is not necessary to indorse the amount of debt and costs on a writ sued out to recover penalties under the Municipal Corporation Act (5 & 6 Will. 4, c. 76, s. 54.)

Welsby shewed cause upon an affidavit which stated the action to be brought for penalties for bribery, under the Municipal Corporation Act, (5 & 6 Will. 4, c. 76, s. 54.) He contended that this was not a case which required the indorsement. It is not necessary to make the indorsement in an action on a bail-bond, *Smart v. Lovick* (a), or on a replevin-bond, *Rowland v. Dakeyne* (b).

Richards, contra.—Contended that the sum claimed was a debt, and that therefore there should have been the usual indorsement.

PARKE, B.—This is clearly not a case within the rule.

ALDERSON, B.—The result of the action may render the defendant not only liable to the penalty, but may disqualify him for civil offices during life.

Rule discharged.

(a) Ante, Vol. 3, p. 34.

(b) Ante, Vol. 2, p. 832.

COURT OF COMMON PLEAS.

Michaelmas Term,

IN THE FIRST YEAR OF THE REIGN OF VICTORIA.

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Costs of obtaining admissions of documents, and of giving notice to produce documents at the first trial of an action, are costs in the cause, where a rule for a new trial has been obtained on payment of costs; but costs for preparing briefs may be allowed as costs of the trial, where the necessity for doing so is shewn.

WILDE, Sejt., had obtained a rule calling on the defendant in this action to shew cause why the Prothonotary should not review his taxation of the costs of the first trial of the cause. The action was in trover to recover possession of a title deed, and the defence was twofold; first, that the possession of the plaintiff was colourable, and to give him a qualification to kill game; and, secondly, a lien on the deed. At the trial, a verdict was returned for the defendant, but a rule for a new trial had been since obtained, on the ground of the verdict being against evidence. The costs were afterwards taxed by the Prothonotary, who allowed those of giving notice to produce certain documents in the possession of the plaintiff, as well as the costs of inspecting certain documents; and of notices, summonses, and other proceedings taken by the defendant, in order to procure admission of certain documents by the plaintiff; of preparing and drawing briefs for counsel; and fees for instructions, consultations, &c. These, it was contended, were costs in the cause, and were improperly allowed as costs of the trial.

Humfrey shewed cause against the rule, and submitted that the taxation was right, for that the notices to produce admissions, &c., would not be available for the next trial, because the defendant might think it necessary to adopt a

fresh line of defence; and if, therefore, they were not allowed as costs of the first trial, the defendant would never get them at all. The rule was, that the successful party should have all the costs to which he had been put at the trial; and the defendant, having succeeded in the present instance, was entitled to the costs of the trial. If the plaintiff should succeed at the second trial, the defendant would never obtain the costs; but if the defendant should again obtain a verdict, the plaintiff would not be called upon to pay over again the costs which were now allowed.

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COLTMAN, J.—Is it not proper that you should lose the costs if you are substantially wrong in the action?

Humfrey urged that the defendant having already got a verdict upon the evidence, for obtaining which the costs had been allowed, it was clear that he was entitled to these costs. If the defendant should require the admissions again, he must take out fresh summonses to obtain them, for there were no terms that they should be available for a second trial.

TINDAL, C. J.—All the documents remain the same. Why should you go before a Judge again for fresh admissions? You must be paid for the living witnesses, who must be brought again at the same expense; but you incur no fresh costs with regard to the documents. If the plaintiff should fail again at the new trial, those will be costs, which you will be entitled to receive.

The *Prothonotary* said, that at the taxation the chief point urged was as to the fees to counsel, and he had allowed full fees, as it might happen that the same counsel could not be engaged, from various causes, in the new trial. The costs of the notices were very trifling in amount, and were not depended upon.

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Wilde, Serjt., in support of the rule.—The question was simply whether costs had been allowed which ought to be considered as costs in the cause, and the material part was as to the allowance of the charges for preparing the briefs, and for fees to counsel. There must be some general rule laid down, for otherwise a defendant might always say that he must take a new course, and shape his defence in a different way; but if he said so, he must make out that it was necessary to do so. The rule gave either party permission to call for the admission of documents, and the admission having been once obtained, there was no necessity for a fresh order, as it was available for every trial. If the plaintiff should obtain a verdict at the new trial, he would be entitled to be paid all the costs which related to the procuring of admissions in the cause, as well as all those to which he had been put attending the defendant's procuring admissions. Those costs were therefore costs in the cause, and the plaintiff was now called on to pay costs, which, if he ultimately succeeded, he ought not to pay; but which, on the other hand, the defendant would be sure to obtain, in the event of his being the successful party in the end. The notices to produce, were to produce at the trial whenever it should take place, and not at any particular trial. With respect to the brief, it was admitted that the only difference between that used on the first trial, and that which was delivered to counsel for the second trial, was the addition to the old matter of the shorthand-writer's notes of the first trial. That was an item which could not be allowed.

TINDAL, C. J.—The only question is, whether the particular items in this bill of costs are, properly speaking, costs in the cause, or of the first trial. The plaintiff having been unsuccessful, and having obtained a rule for a new trial, he is bound to make good all the costs of the last trial; but there is a broad distinction between costs of

the trial and costs of the cause. The costs of the pleadings, for instance, are never allowed. So also, there may be many parts of the evidence which remain untouched, and which may be used again as to that part of the case to which it refers, and the costs of which would not be properly costs of the trial. The costs of notices which were given in the cause, of attending Judges, and making admissions, are the same on the second trial as on the first. One question is, as to the allowance of costs for preparing the briefs. There may be cases in which some alteration is necessary in briefs, but those should form exceptions to the general rule, by its being made out to the satisfaction of the Prothonotary that the amendments are necessary. Then comes the point, perhaps the most important of all, whether, in the allowance for costs, the payment of full fees to counsel is to be required, or whether the allowance of a reasonable sum for a refresher is not sufficient. I think that is a point on which the practice of all the Courts ought to agree; and I am of opinion, therefore, that the matter should be referred back to the Prothonotary, in order that inquiries may be made with a view to assimilating the practice.

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The rest of the Court concurred.

Rule accordingly.

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 BADEN v. FLIGHT.

WILDE, Serjt., shewed cause against a rule which had been obtained by *Hoggins* for rescinding an order of *Vaughan*, J., by which leave was given to the plaintiff to amend his declaration on payment of costs. It appeared that the action was brought to recover two quarters' rent

A Judge's order having been obtained on the 3rd May, to amend a declaration, the defendant is too late in coming to the Court on

the 10th June, in Trinity Term, to set aside the order.

Semble, that a plaintiff who has demurred to a plea, and has obtained judgment, having obtained a Judge's order to amend, may efface that part of the cause of action from the declaration to which the plea was pleaded, without paying the costs of the demurrer.

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Wilde, Serjt., in support of the rule.—The defendant simply whether costs had been allowed to one of considered as costs in the cause, argued, judgment was as to the allowance of the costs. Look out a summons briefs, and for fees to counsel. There was made generally general rule laid down, for a on payment of costs. always say that he must stand on the ground that defence in a different way. What particular the declaration out that it was necessary and that it did not also direct party permission of the demurrer, as well as those and the admission. It was submitted that the application no necessity for the order was made on the 3rd of May, trial. If the defendant did not come to the Court to set it aside trial, he would be liable. The defendant also had acted upon the order, for as he had taken his bill of costs to the Prothonotary for the purpose of having it taxed, and he had received the costs on the 3rd of June. The amendment in the declaration was afterwards made, and the defendant then took out a summons, and on the 6th of June obtained an order for time to plead to the amended declaration.

Hoggins, in support of the rule, urged that the defendant had good grounds of complaint. The plaintiff having succeeded in his demurrer to the defendant's plea, took out a summons to efface from his declaration that part of it to which the bad plea had been pleaded. The ground, therefore, on which this rule had been obtained was, that if the plaintiff was right in effacing the cause of action from the record, the defendant was entitled to the costs of the demurrer. The defendant, it was true, had received the costs of the amendment, but he had not paid the plaintiff the costs of the demurrer.

TINDAL, C. J.—All the plaintiff says is, "I will go no further; I will efface the cause of action, to which the

relates, from the declaration, and I will waive my that." I think the defendant will be benefited by his course, for, if he had chosen to go on, he must have paid him the costs of the plea as a judgment against himself before the

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admitted that the defendant would have been the costs of the trial.

TINDAL, C. J.—I do not know that; it would not necessarily follow. At all events, the defendant should have come to the Court sooner, and should not have suffered the case to stand until the end of term, by which the cause was prevented from being tried.

Hoggins.—The rule having been obtained on the 10th of June, and the term not having ended until the 12th, there was abundance of time for shewing cause in that term.

Wilde, Serjt.—The 10th was Saturday, and the plaintiff could not obtain a copy of the affidavits until the Monday, and the rule was enlarged on that ground.

Hoggins.—The defendant had now a judgment against him on a plea, respecting which there was no declaration on the record; and the defendant had been harassed with an action to recover a quarter's rent, for which there was no cause.

TINDAL, C. J.—This application comes too late. Although it may appear that there is no declaration with respect to the plea on which the plaintiff has obtained judgment, yet the plea falls with the count; and on the record being finally made up, both will be omitted. The costs must be costs in the cause.

Rule discharged.

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claimed to be due from the defendant, and the defendant pleaded two pleas. The plaintiff demurred to one of them; and the demurrer having been argued, judgment was given for the plaintiff. He then took out a summons to amend his declaration, and an order was made generally by Mr. Justice *Vaughan* to amend on payment of costs. The present rule had been obtained on the ground that the order did not specify in what particular the declaration should be amended, and that it did not also direct the payment of the costs of the demurrer, as well as those of the amendment. It was submitted that the application came too late: the order was made on the 3rd of May, but the defendant did not come to the Court to set it aside until the last day but two of Trinity Term, the 10th of June. The defendant also had acted upon the order, for he had taken his bill of costs to the Prothonotary for the purpose of having it taxed, and he had received the costs on the 3rd of June. The amendment in the declaration was afterwards made, and the defendant then took out a summons, and on the 6th of June obtained an order for time to plead to the amended declaration.

Hoggins, in support of the rule, urged that the defendant had good grounds of complaint. The plaintiff having succeeded in his demurrer to the defendant's plea, took out a summons to efface from his declaration that part of it to which the bad plea had been pleaded. The ground, therefore, on which this rule had been obtained was, that if the plaintiff was right in effacing the cause of action from the record, the defendant was entitled to the costs of the demurrer. The defendant, it was true, had received the costs of the amendment, but he had not paid the plaintiff the costs of the demurrer.

TINDAL, C. J.—All the plaintiff says is, “I will go no further; I will efface the cause of action, to which the

demurrer relates, from the declaration, and I will waive my costs as to that." I think the defendant will be benefited by the plaintiff's course, for, if he had chosen to go on, the defendant must have paid him the costs of the plea on which there was a judgment against himself before the Court.

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Hoggins submitted that the defendant would have been entitled to the costs of the trial.

TINDAL, C. J.—I do not know that; it would not necessarily follow. At all events, the defendant should have come to the Court sooner, and should not have suffered the case to stand until the end of term, by which the cause was prevented from being tried.

Hoggins.—The rule having been obtained on the 10th of June, and the term not having ended until the 12th, there was abundance of time for shewing cause in that term.

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TINDAL, C. J.—This application comes too late. Although it may appear that there is no declaration with respect to the plea on which the plaintiff has obtained judgment, yet the plea falls with the count; and on the record being finally made up, both will be omitted. The costs must be costs in the cause.

Rule discharged.

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BERTRAM *v.* DAVIS.

Cepi corpus being returned by the sheriff to a writ of capias, without a Judge's order or rule of Court, and an order to bring in the body being disobeyed, the plaintiff is entitled to a rule absolute to make the order a rule of Court, and for an attachment under R. G. H. T. 3 Will. 4.

BUTT moved to make a Judge's order for bringing in the body a rule of Court, and also for an attachment for not obeying the order. The rule of Court of H. T. 3 Will. 4 (a) was referred to, which ordered that in case a rule of Court or Judge's order for returning aailable writ of capias should expire in vacation, and the sheriff or other officer having the return of such writ should return cepi corpus thereon, a Judge's order might thereupon issue, requiring the sheriff or other officer, within the like number of days after the service of such order as by the practice of the Court was prescribed with respect to rules to bring in the body issued in term, to bring the defendant into Court, by forthwith putting in and perfecting bail above to the action; and if the sheriff or other officer should not obey such order, and the same should have been made a rule of Court in the term next following, it should not be necessary to serve such rule of Court, or to make any fresh demand thereon, but an attachment should issue forthwith for disobedience of such order, whether the bail should or should not have been perfected in the meantime. The only peculiarity in the present case was, that there had been no rule or Judge's order for the return of the capias, but the writ was returned without it. There was an order for bringing in the body, which was disobeyed; and it was submitted, that the plaintiff was entitled to the attachment, notwithstanding there was no order for the return of the writ.

TINDAL, C. J.—The case is within the rule. Cepi corpus has been returned, and whether the writ was returned with or without an order, is immaterial.

Rule absolute.

(a) Ante, Vol. 1, p. 731.

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CORBYN *v.* HEYWORTH.

R. V. LEE shewed cause against a rule nisi obtained by *Keating* for judgment as in case of a nonsuit. He objected that the affidavit on which the rule was granted did not allege the cause to be at issue, although it stated notice of trial to have been given; and he urged, that, although *primâ facie*, the cause might appear to be at issue from notice of trial having been given, yet that the proceedings might be irregular. He cited *Smyth v. Parslow (a)*, where it was held, that an affidavit in support of a similar application, alleging certain facts, and that the cause was "thereby" at issue, was insufficient, for that it must be sworn, without qualification, that the cause was at issue.

An affidavit, in support of a rule for judgment as in case of a nonsuit, alleging notice of trial to have been given, without stating the cause to be at issue, is sufficient.

Keating, in support of the rule, was stopped by the Court.

TINDAL, C. J.—It is sworn that notice of trial was given; and how could that be, if the cause was not at issue? I think the affidavit alleges enough, and the rule must be absolute, unless the plaintiff will give the usual peremptory undertaking. The case of *Smythe v. Parslow* is different from this.

Rule discharged, on a peremptory undertaking.

(a) Ante, Vol. 1, p. 308.

Ex parte DAVIES.

TALFOURD, Serjt., moved for leave to amend a writ of habeas corpus sued out at the instance of a prisoner in

The Court granted an application on behalf of a pri-

soner to amend the teste of a writ of habeas corpus sued out at his instance, it being tested of T. T "1 Victoria," instead of "7 William 4."

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custody of the Sheriff of Warwick. The defect in the writ was in its being tested of the last day of T.T. of "1 Victoria," instead of "7 William 4." In the case of *Wakeling v. Watson* (a), a writ of subpœna ad respondendum being tested in the name of the wrong Chief Baron of the Exchequer, a rule was granted by the Court for its amendment. In *Morris v. Herbert* (b), a contrary decision was pronounced.

TINDAL, C. J.—There is no objection to the rule being granted. The application is made on behalf of the prisoner himself, and the Court will take judicial notice of the fact, that her present Majesty had not acceded to the Throne in Trinity Term, 1837.

Rule granted.

(a) 1 Cr. & J. 467.

(b) 1 Price, 245.

DOE *d.* MINGAY *v.* ROE.

Service in ejectment on the wife of the tenant in possession, it not being sworn that it was on the premises, or that she was living with her husband, is insufficient.

BAYLEY moved for judgment against the casual ejector. The premises were in the possession of four tenants, three of whom had been regularly served, but a question arose as to the service which had been effected with regard to the fourth. It was sworn that the declaration was left with the wife of the tenant, but there was no allegation that it was on the premises, or that she was living with her husband. It was submitted that a rule nisi might be granted as to this tenant.

TINDAL, C. J.—I think that the rule against the fourth tenant cannot be granted. The only ground on which service on the wife would be sufficient is, that she was in communication with her husband, but that is not shewn to be the case here. You may take a rule as to the three tenants, and you will probably be able to amend your affidavit as to the fourth.

Rule accordingly.

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WILKINSON v. PENNINGTON.

GODSON moved that service of a rule nisi for an attachment against the plaintiff in this action, who was an attorney, on his attorney on the record, and by sticking it up in the office of the Prothonotary, might be deemed good service. It was an action brought to recover the amount of a bill of costs, and the cause came down for trial at the sittings in last term. The plaintiff, however, withdrew the record, and a rule was obtained for the costs of the day. In the month of June the costs were taxed, but, as they were not paid, a rule nisi for an attachment was obtained. Every effort had since been made to serve this rule on the plaintiff, but without success. Application had been made to the plaintiff's attorney on the record, but he stated that he had no authority to pay, nor any money belonging to the plaintiff in his hands; but he said that, if any letter were intrusted to him, he would forward it to the plaintiff. The defendant was not in a situation to ask for judgment as in case of a nonsuit, and it was submitted that the costs might never be paid, and the plaintiff might never go on with the action. The plaintiff was an attorney, and was therefore supposed to be in Court, and on this ground it was suggested that the proposed service should be substituted for personal service, which in cases of attachment was usually necessary. The application was made with a view to an attachment being hereafter issued, or, in the alternative, that the plaintiff might be prevented from going on with the action, until the costs had been paid.

The Court will not dispense with personal service of a rule for an attachment, in a case where the person sought to be served is an attorney, and the attempts to serve him personally have been ineffectual.

TINDAL, C. J.—I do not know how we can help you. We cannot make any fresh rule that, because the plaintiff is an attorney, personal service shall be dispensed with.

Rule refused.

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DOE *d.* CROOKS *v.* ROE.

The declaration in ejectment being intitled of "T. T. 1 Victoria," and that term not having arrived, the Court granted a rule for judgment against the casual ejector, the notice being right.

HENDERSON moved for judgment against the casual ejector. The declaration was intitled as of Trinity Term, 1st Victoria, that term not having yet arrived. The notice attached to the declaration, however, was regular as to the time of appearance.

TINDAL, C. J.—That will do.

Rule granted.

JAMES *v.* HARRIS.

Semble, that the Court will not grant permission to enter up judgment on an old warrant of attorney, executed by a marksman, where it is only sworn that the warrant was "duly executed," and it is not stated that it was read over to the defendant.

HODGES moved for leave to enter up judgment on an old warrant of attorney. The affidavit was regular as to the usual facts, and it stated that the defendant was a marksman, and that the warrant was regularly signed, sealed, and delivered by him, and was "duly executed." It did not, however, allege that it was read over to him; but this, it was urged, was immaterial, as it was sworn to have been "duly executed."

TINDAL, C. J.—You had better set this affidavit right, as you can no doubt do so in a few days.

Rule refused.

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BRASHOUR v. RUSSELL.

W. H. WATSON shewed cause against a rule obtained by *Wilde*, Serjt., for setting aside the copy of a writ of capias for irregularity, and for the discharge of the defendant out of custody in this action, on his entering a common appearance, and for the payment of the costs of the application by the plaintiff. From the affidavit on which the rule had been obtained, it appeared that a writ of capias had been issued on the 7th September, 1837, and the defendant arrested on the 12th October, and that a copy of the writ of capias had been delivered to him, which was in the handwriting of Thomas Williams, the clerk to Ralph Israel, the officer of the sheriff, and that in that copy the writ purported to have been issued in the reign of William the 4th, although the writ had been really issued in the reign of Victoria. As this error only existed in the copy of the writ of capias, *Watson* contended that it was not of such importance as to induce the Court to discharge the defendant out of custody. It was not shewn that the original writ, or that the copy of the writ, which was delivered to the sheriff's officer, was irregular, but the objection was taken to the copy served on the defendant, and which was sworn to be in the handwriting of some persons with whom the plaintiff had no connection. The error, besides, did not prejudice the defendant. An affidavit was now produced in answer to that which was sworn by the defendant, in which it was stated that a true copy of the writ had been delivered to the sheriff's officer. The plaintiff, therefore, had done what was required of him by the statute 2 Will. 4, c. 39, s. 4. The plaintiff surely should not be deprived of his just rights on account of a technical error like the present, committed by a person over whom he had no controul, and which was solely attributable to an old printed form having

After a defendant has been in custody twenty-three days, it is too late to object to the copy of the writ of capias served on him at the time of his arrest, on the ground of its purporting to have been issued in the reign of Will. 4, although really issued in that of Victoria, as the application should have been made within the time for putting in bail.

Seemle, that such an error does not make the arrest void, but merely irregular.

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been used without the necessary alteration in the name of the Sovereign. The arrest was regular, and therefore the defendant ought not to be discharged out of custody, although the irregularity complained of might be a reason for his having an amended copy of the writ. It might be said that the arrest was not complete, for that the service of a true copy was a necessary ingredient in order to render it regular; but the statute required that the defendant should be served "upon or forthwith after the arrest," and it was therefore clear that the custody was good (a).

BOSANQUET, J.—How is the defendant to know that he is lawfully in custody, unless the copy of the writ served on him is correct? Have not many prisoners been discharged on similar grounds?

W. H. Watson.—In those cases there was some defect in the copy delivered by the plaintiff to the sheriff, or in the original writ.

COLTMAN, J.—The arrest in this case is not the point, but the detention. In the case of *Hodd v. Langridge* (b) the Court held, that the copy of the writ served on the defendant must be regular, and that, if a defective copy were given, the Court would presume that that delivered to the sheriff was also irregular.

W. H. Watson then urged, that the defendant was out of time in coming to the Court so long after the arrest. Twenty-three days had elapsed between the time of his arrest and his applying for the present rule. *Primrose v. Baddeley* (c) was an authority to shew that such an appli-

(a) See *Shearman v. M'Knight*, ante, Vol. 5, p. 572.

(b) Ante, Vol. 5, p. 721.

(c) Ante, Vol. 2, p. 350.

cation must be made within a reasonable time, and that the rule applied to prisoners as well as others; and *Cox v. Tullock* (a) shewed that when the irregularity was in proceedings had in vacation, the application might be made at chambers, and that the party could not wait until the first four days of term.

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Wilde, Serjt., stated that the matter had been taken to chambers two days after the arrest, and had been adjourned for consideration.

W. H. Watson.—As this did not appear on the affidavits, the Court could not take it from the statement of counsel.

COLTMAN, J.—In *Fowell v. Petre* (b), a party applying to the Court after nineteen days, and objecting to a defect in the affidavit to hold to bail, was held to be too late.

Wilde, Serjt., in support of the rule, contended that the arrest was not regular, unless the whole of the terms required by the statute had been complied with. Although the statute did not absolutely say that the arrest should be void unless all the things required were done, yet the Courts had given effect to its meaning, in requiring the terms to be strictly fulfilled. The custody of the defendant must be entirely legal, and it was no answer to say that the failure was in any particular person. No defendant could be rightfully in custody under the statute, unless he received a true copy of the writ of *capias*; and whether it was that the writ was wrong, or that the copy was wrong, it was immaterial, and the error was equally available. The very fact of his being in custody would prevent him from ascertaining where the error commenced.

(a) Ante, Vol. 2, p. 47.

(b) Ante, Vol. 5, p. 276.

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Then, with regard to the question of time, it was sufficient for the defendant to say that he was now in custody, and, that custody being illegal, he would be entitled to his discharge. The objection was not a mere technical one to the want of form of an affidavit, but it was a substantial one to the legality of the custody; and there was an obvious distinction between the two cases; the one depended on the practice of the Court, the other on the statute. If a correct copy had been served, the case might have assumed a different aspect; but it was not so, and therefore the objection as to time could not apply to the case. The statute was for the benefit of defendants, and a strong opinion was given by this Court in the case of *Nicol v. Boyne* (a), of the necessity of adhering strictly to the precise forms which were given by statutes. The case of *Smith v. Pennell* (b) was also in point. The plaintiff could not lose any thing by this rule being granted, for he had his remedy against the sheriff in the event of his suffering by his neglect; but it was enough for the defendant to say that there had been an irregularity, and to claim the benefit of the statute.

TINDAL, C. J.—I think this application comes too late, and it is a fault on the part of the defendant that he has made no excuse for not applying to a judge at chambers. It is a rule often acted upon, that unless some sufficient cause is shewn for not applying to the Court on any ground of irregularity, an application will not be entertained after eight days shall have elapsed, which is the time limited for putting in special bail. A question has arisen, as to whether, in consequence of the error in the copy of the capias, delivered to the defendant, the arrest is void, or, whether the error amounts to more than an irregularity, and on looking at the rule of 10 Reg. Gen.

(a) Ante, Vol. 2, p. 761.

(b) *Ib.*, p. 654.

M. T. 3 Will. 4(a), I think it is an irregularity only. By that rule, it is clear, that on an application to the Court by the party who sued out the writ, any irregularity may be permitted to be amended, and if that be so, I think the present case comes within the rule to which I have referred, and the application is consequently too late. It is unnecessary to go into the other point as to whether this neglect of the sheriff's officer, would be sufficient to induce the Court to discharge the defendant out of custody, but I think there is no doubt that it would be so.

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BOSANQUET, J.—I am of the same opinion, and I do not think it necessary to repeat the grounds stated by the chief justice, but I think that this omission to state correctly the name of the king or queen, falls within the rule of M. T. 3 Will. 4. Then it is quite clear, that it must be taken advantage of in reasonable time, and eight days is the time limited in a case of this description. That has been decided, and it has been acted upon frequently at chambers. On the other point, it is unnecessary to give any opinion, although I should be very sorry to be supposed to have any doubt on the subject.

COLTMAN, J.—I am of the same opinion.

Rule discharged.

(a) Ante, Vol. 1, p. 473.

DOWNTON v. STYLES.

BEST had obtained a rule nisi for an attachment against W. Finch, an attorney of the Court, for not obeying an order of this Court.

An affidavit in support of a rule for an attachment against an attorney for not obeying an

order of Court, not stating him to be an attorney of the Court in which the rule has been obtained, is sufficient, since 1 Vict. c. 56, s. 4.

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 v.
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R. V. Richards shewed cause.—He objected to the affidavit on which the rule had been obtained, on the ground of its not stating the attorney to be an attorney of this Court.

Best, *contra*, contended, that Finch was clearly shewn to be an attorney; and that as, by the statute 1 Vic. c. 56, s. 4, an attorney of one Court was permitted to practise in another, and provided that he should be liable to the jurisdiction of that Court, as if he had been duly admitted, the description was sufficient.

TINDAL, C. J., was of opinion that the affidavit was sufficient.

On the merits the rule was discharged.

Rule discharged.

SMITH, Administratrix, v. THE FESTINIOG RAILWAY COMPANY.

Where, in an action which was referred to an arbitrator, there were two issues, but only one breach, and the arbitrator, in his award, directed a verdict to be entered on the first issue, with 1s. damages, and on the second issue with 13s. 4d. damages:—*Held*, sufficient.

COWLING moved for a rule nisi to set aside an award, on the ground of its being bad on the face of it. The plaintiff was administratrix of John Smith, her husband, and the action was brought on an agreement, by which the intestate agreed to perform certain work for the defendants in making a railway, for which he was to be paid 6000*l.*, in instalments, as the work was done. The declaration alleged seven-eighths of the work to have been done, but that the defendants did not pay the instalments as they became due, the seventh still remaining unpaid. The defendants pleaded, first, the non-performance of the work in the manner alleged; and secondly, that they had paid the instalments according to the tenor, intent, and mean-

ing of the covenant, as they became due. The cause came down for trial at Liverpool before *Coltman, J.*, but was referred to an arbitrator, with all matters in difference, the costs of the reference and of the cause to abide the event. The arbitrator, in his award, directed that a verdict should be entered for the plaintiff on both issues; on the first issue, with 1*s.* damages, and on the second with 13*s.* 4*d.* damages. This finding, it was now urged, was uncertain; for the first two issues were on one breach, and the arbitrator therefore should have directed the verdict to be entered with reference to the breach, and not with reference to the issues, and should have fixed some one specific sum.

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SMITH
v.
FESTINIOG
RAILWAY
COMPANY.

TINDAL, C. J.—Why should not the two sums be added together, and the verdict entered for 14*s.* 4*d.*? The arbitrator had a right to find nominal damages on the first plea, finding it to be untrue in fact, and that the plaintiff had done the work. I do not see that we ought to go out of our way to discover a fault in the finding of the arbitrator. The result appears to be that he went into the accounts between the parties, and found 13*s.* 4*d.* due.

Cowling referred to the case of *Mortin v. Burge (a)*.

TINDAL, C. J.—The arbitrator directs the verdict to be entered on each of the issues, and I think it would be straining to get rid of the justice of the case if we were to grant this rule. The two sums added together would make a very good sum to be entered as the amount of the verdict.

Rule refused.

(a) 4 Ad. & Ell. 973.

1837.

DALEY v. D'ARCY MAHON.

An affidavit of debt, alleging the defendant to be indebted in 1844. on a promissory note "drawn and made payable for the like sum," is sufficient, and the amount of the note need not be more specifically mentioned.

The jurat of an affidavit sworn before a commissioner, stating it to have been received "by virtue of a commission forth," and omitting the word "issued," is sufficient.

An objection to an affidavit of debt, that it is not intitled in any Court must be taken within the time limited for entering an appearance, and, in the case of a prisoner, sickness does not excuse delay.

HURLSTONE moved for a rule nisi to discharge the defendant out of custody, on his entering a common appearance. The ground on which he applied was a defect in the affidavit of debt, as it did not state the amount of the promissory note, on which the action was brought. The affidavit merely stated that the defendant was indebted in 1844. on a promissory note "drawn and made payable for the like sum." The case of *Molineux v. Dorman*(a) was relied on.

TINDAL, C. J.—The affidavit clearly indicates the amount of the note, and I think it is sufficient.

Hurlstone then objected to the jurat. It stated the affidavit to have been sworn before a Commissioner in Ireland "by virtue of a commission forth from the Court of Common Pleas." The word "issued" was omitted, and this, it was contended, was material, as without the word, the jurat was unintelligible.

TINDAL, C. J.—The meaning of the jurat is plain enough, and you cannot be successful on that objection.

Hurlstone made a third objection to the affidavit, that it was not intitled in this Court pursuant to 1 Reg. Gen. H. T. 2 Will. 4, s. 4, and urged that it could not therefore be used. The rule was, "An affidavit sworn before a Judge of any of the Courts of King's Bench, Common Pleas, or Exchequer shall be received in the Court to which such Judge belongs, though not intitled of that Court; but not in any other Court, unless

(a) Ante, Vol. 3, p. 662.

intituled in the Court in which it is to be used" (a). He, however, pointed out that the case had already been before a Judge at Chambers, and an objection having been taken to the application, on the ground of its being too late, and some doubt being entertained by the Judge, it was agreed that the case should stand over for the opinion of the Court. The arrest was the 25th July, and the application to the Judge was not made until the 15th August.

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v.
MAHON.

TINDAL, C. J.—The rule has been, that such an objection should be taken before the time limited for entering an appearance has expired.

Hurlstone said that there were contrary decisions upon the subject. In *Rock v. Johnson* (b), which was a decision in the Court of Exchequer, it would appear that the rule was not so strict with regard to prisoners, as with respect to persons at large. It was true that in *Fowell v. Petre* (c), the Court of King's Bench held that such an application by a prisoner, after nineteen days, was too late; but in *Primrose v. Baddeley* (d) it was said, that the delay might be accounted for by an affidavit. Here, an affidavit was made by the defendant, which stated, that the deponent had been suffering from ill health, which was of so serious a nature, that he was entirely prevented from attending to business.

TINDAL, C. J.—I do not think that is a ground on which the defendant can be excused by the Court; but it must be some such reason, as that his attorney has deceived him, or acted unfairly by him. He put his affairs into the hands of his attorney, and his personal attendance to

(a) Ante, Vol. 1, p. 184.

(c) Ante, Vol. 5, p. 276.

(b) Ante, Vol. 4, p. 405.

(d) Ante, Vol. 2, p. 350.

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v.
MAHON.

the business was unnecessary. Besides, if personal affliction were a ground for excuse, the want of money, which is in one sense an affliction, might be urged in some future case. I was disposed to grant a rule on the want of title to the affidavit, but owing to the tardiness of the defendant in coming to the Court, I must refuse to do so.

Rule refused.

DELEGAL v. HIGHLEY.

Where, in an action of libel, the plaintiff demurs to the pleas to the second count in the declaration, takes issue on those pleaded to the first count, and replies *de injuriâ* to the pleas to the third count, and obtains judgment on the demurrer; the Court will not permit him to withdraw his replication to the pleas to the third count, and demur, on the ground that those pleas are open to the same objection as those before demurred to, but will permit him to withdraw the first and third counts of the declaration.

WILDE, Serjt., had obtained a rule calling on the defendant to shew cause why the record should not be amended by striking out the first count in the declaration, and by withdrawing the replication of *de injuriâ* to the pleas to the third count, and substituting a demurrer for those pleas.

Talfourd, Serjt., and *E. V. Williams*, shewed cause. It was an action brought to recover damages for the publication of a libel, which consisted of a statement of the proceedings in a charge made before the Lord Mayor at the Mansion-house, London, and the declaration contained three counts. The defendant pleaded several pleas, justifying the publication as a true account of the proceedings, and the plaintiff demurred to those pleas which were pleaded to the second count of the declaration and replied *de injuriâ* to those pleaded to the third count. On argument the Court held the pleas to be bad, on the ground that in the statement there were contained some observations of a nature injurious to the plaintiff's character, which were made by a person in Court, who held the situation of clerk to the Lord Mayor, and who therefore was not called upon by his duty to say anything. Judgment was therefore given for the plaintiff on this demurrer, and the object of the pre-

sent rule was to withdraw the replication of de injuriâ to the pleas to the 3rd count of the declaration, in order that they also might be demurred to on the above ground, as it was suggested that they were liable to the same objection. It was submitted, however, that as this was an application entirely to the discretion of the Court, and as the plaintiff's case was not of a nature to entitle him to any favour, the Court would discharge the rule. No precedent could be found for such an alteration being made. The case of *Strother v. Randerson* (a) was in point. That was an action of trespass for an assault, and the pleas were, first, not guilty; and, secondly, a justification: the plaintiff replied, joining issue on these pleas and new assigning, and the defendant demurred to the replication and the new assignment. On the first issue there was a verdict with 15*l.* damages, and on the second issue, nominal damages were given. The plaintiff then entered a nolle prosequi as to the new assignment, and gave the defendant judgment on the demurrer, and the Court set aside the nol. pros. Mr. Justice Coleridge there laid down the principle that the nol. pros. might be entered as to the whole cause of action; but, if the plaintiff proceeded as he desired, he would be taking the chance of a verdict on the general issue, and then, if he succeeded, he would abandon his new assignment, keeping all he could get by the verdict. In *De Rutzen v. Lloyd* (b) the principle of that case was recognised incidentally.

Wilde, Serjt., contra, said that the reason for striking out the first count was, that some doubt existed as to its sufficiency, and it was the constant practice to allow one of several counts to be withdrawn. The pleas to the second count had been already held bad, and it would be therefore useless to go down to trial on the pleas to the third

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v.
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(a) Ante, Vol. 5, p. 280.

(b) 5 Ad. & Ell. 456.

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count, for even if the defendant should obtain a verdict, the plaintiff would be entitled to judgment non obstante veredicto, as they were open to the same objection.

TINDAL, C. J.—This is a case in which we can lay down no general rule, but I confess I do not think that the plaintiff, after having made this election, and joined issue, is entitled to adopt this course. He may, however, strike out his first and third counts, for, as to them, he is at liberty to enter a nolle prosequi, on paying the defendant his costs occasioned by the amendment, but we cannot permit him to withdraw his replication and demur.

The other Judges concurred.

Rule discharged accordingly.

STAPLES and Another v. HOLDSWORTH.

A plea of the bankruptcy of one of the plaintiffs since the commencement of the action, is not an issuable plea, within the terms of pleading "issuably," imposed on obtaining time to plead.

GREENWOOD had obtained a rule in this action, which was in assumpsit, for pleading the bankruptcy of one of the plaintiffs since the commencement of the suit. It appeared that the action was commenced in the year 1827, and, in Trinity Term of that year, a declaration was delivered. On the 27th of November, an order for time to plead was obtained by the defendant; and, after that, owing to the absence of one of the plaintiffs from England, the plaintiff did not proceed until September, 1836. A term's notice was then given by the plaintiffs, and a demand of plea made; but, on the 8th of May, 1837, the order for time to plead was renewed, upon the terms of pleading issuably, rejoining gratis, and taking short notice of trial. The question raised by the present rule was, whether a plea of the bankruptcy of one of the plaintiffs, since the commencement of the action, was an issuable plea, within the meaning of the terms imposed.

R. V. Richards shewed cause against the rule, and stated that a summons had already been taken out at chambers with the same object as the present rule, but an order was refused by Mr. Justice *Bosanquet*; so that, in fact, the present application was for a review of the decision of that learned Judge. It was admitted, that, under the terms of the order to plead issuably, the defendant was no doubt entitled to plead, not merely the general issue, but any other pleas on which the plaintiff might take issue, and go to trial on the substantial merits of the case. A plea in abatement was not an issuable plea, nor was a plea of alien enemy, nor *plene administravit*; why, therefore, should a plea of bankruptcy be considered issuable? In Chitty's *Precedents of Pleading* (a) a case of *Barker v. Skinner* was referred to, where it had been held, before *Patteson*, J., at chambers, that a plea of the bankruptcy of one of the plaintiffs since the commencement of the action, was not an issuable plea. Besides, he had an affidavit, made by the assignee of the bankrupt, who swore that he had not interfered, and did not intend to interfere, with the action, or to make any claim on the defendant.

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Wilde, Serjt., and *Greenwood*, in support of the rule.— Under an order to plead issuably, a party could not be compelled to give up a substantial defence to the action. By the 63rd section of the Bankrupt Act, 6 Geo. 4, c. 16, it was provided, “ that the Commissioners of Bankrupts should convey all present and future personal estates of a bankrupt, and all property which might come to him before he should have obtained his certificate, as well as all debts due to the bankrupt, to the assignee; and such assignment should vest the property, right, and interest in the assignees; and, after the assignment, neither the bankrupt, nor

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any other person claiming through or under him, should have the power to recover the same, nor to make any release or discharge thereof; but the assignees should have like remedy to recover the same in their own names, as the bankrupt himself might have had, if he had not been adjudged bankrupt." This act, therefore, was specific in shutting out the bankrupt from any right to receive the proceeds of the action. The pleas which had been referred to, as being of a similar character to that of bankruptcy, were only of a nature to raise a temporary disability, and to delay the action, but not to defeat it.

BOSANQUET, J.—There is a case of *Searle v. Bradshaw* (a), in which a defendant, in an action against him as administrator, being under terms to plead issuably, pleaded plene administravit and his own bankruptcy; and it was held, that the plaintiff was at liberty to sign judgment as for want of a plea.

WILDE, Serjt.—The argument in that case turned on the question as to how far the plea of the defendant's own bankruptcy was available, as there must have been a devastavit before the bankruptcy. *Minchin v. Hart* (b) was a case where an opinion was expressed at variance with the decision at chambers; and that decision, indeed, appeared to have been given with reference to the particular circumstances of the case, and not in pursuance of any general rule. *Kinnear v. Tarrant* (c) was a case in which it was held, that, to a scire facias against bail upon their recognizance, it was competent to the defendant to plead, in bar against the issuing of execution, that, before the time of issuing the alias writ of scire facias, the plaintiff became bankrupt, and a commission issued against him. Up to that time, an idea had existed that the assignees

(a) Ante, Vol. 2, p. 289.

(b) 1 Chitt. Rep. 215.

(c) 15 East, 622.

could go on in the name of the bankrupt; but there, the law was considered, and a decision given that they could not. Mr. Baron *Bayley* referred to the case, as correcting the law in this point, in *Biggs v. Cox* (a). The decision in *Stadholme v. Hodgson* (b), that the Statute of Limitations was not an issuable plea, was overruled by the subsequent case of *Rucker v. Hannay* (c). So far from there being any reason, in fact, why that plea should not be pleaded, it was so distinctly to the merits, that a defendant might plead it against a special order. So long as the plea barred the plaintiff in the action, it was good, and could not be objected to as not issuable. After an order to plead issuably, a special demurrer was allowed: *Barker v. Gleadow* (d), which was a decision overruling *Sawtell v. Gillard* (e), and other cases of that class. *Newnham v. Dowding* (f) was a case, also, where it was held that a special demurrer might be pleaded, after an order to plead issuably, on the ground of misjoinder of counts in the declaration. The merits were any such objections as were answers to the plaintiff's cause of action, whether they depended on an act of Parliament or not. They were not the moral merits, but those which were legal, for an inquiry into the moral merits of a case was too wide to be entertained by the Court. The rules of law and of evidence were not framed for them, and the Court, in deciding on them, would be deciding on a question not within their jurisdiction. *Maddocks v. Holmes* (g) was also cited.

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Cur. adv. vult.

TINDAL, C. J.—This was a motion for leave to plead the bankruptcy of one of the plaintiffs, which took place

(a) 4 B. & C. 920.

(b) 2 T. R. 390.

(c) 3 T. R. 124.

(d) Ante, Vol. 5, p. 134.

(e) 5 D. & R. 620.

(f) 1 Chitt. 711.

(g) 1 Bos. & P. 228.

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after the commencement of the action, in addition to the plea of non assumpsit. It was made by way of appeal from the decision of a judge at chambers, who had refused to allow the two pleas. The defendant had had time given him to plead on the usual terms, one of which was, that he should plead issuably; and the question debated on the motion before us, was, whether the proposed plea is an issuable plea within the meaning of a judge's order; and we are of opinion that it is not. The meaning of the terms "pleading issuably," as stated by Lord *Kenyon* (a), is, not merely pleading a plea on which issue may be taken, but such a plea as goes to the merits; and the substantial merits of the action in this case are, whether the defendant ever entered into the alleged contract, and whether he has broken it; but the effect of the proposed plea, if allowed, will be merely to turn the plaintiffs round, in order that the same question may be litigated in another action. It is obvious that the substantial merits of the controversy between these parties may be tried as well in the present action, as in one to be brought by the solvent plaintiff and the assignees of the bankrupt, against the present defendant. It also appears to us, that no injury can result to the defendant from his being compelled to try the question of his liability in the present form of action; for, if the plaintiffs should recover judgment against him, and receive satisfaction, the present defendant can never be compelled to pay the money over again. Or, if we put the case the other way, and suppose the defendant to succeed in the present action, and obtain a judgment on a plea which goes to the merits, we are of opinion that in that case also, the judgment would be a bar to any subsequent action which might be brought by the solvent plaintiff in conjunction with the assignees of the bankrupt. It was argued, that the defendant may have a good de-

(a) 8 T. R. 71.

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fence against any action to which the assignees are parties, though such defence might not be available against the present plaintiffs, and that it is unjust to deprive him of any advantage which the proposed plea would give him. It appears to us, however, that the possibility of a good defence being made to the action, if brought by the assignees, does not render the plea an issuable plea on the merits. That must depend, not on any extrinsic circumstances, but on the nature of the defence raised by the plea itself. If there are any circumstances de hors the plea, which would render it fit that it should be pleaded, they may, in the particular case, furnish grounds for an application to be released from the terms imposed by the judge's order, but they cannot make the plea itself an issuable plea. Another argument pressed upon us has been, that the defendant may wish to examine the bankrupt, or to give in evidence declarations made by the assignees; but we think the same answer applies to this as to the preceding objection. A further ground, on which, the propriety of allowing the two pleas to be pleaded, becomes very questionable, is, that the one is a plea in bar generally, and the other a plea to the further maintenance of the action; but as a decision on that ground would probably lead only to a further application to the Court in a different form, we have thought it best to decide the question upon the point which has been argued before us; and we cannot but observe, that in the particular case before us, there is the less reason to doubt that the plea is dilatory, as the assignees are stated to have declined interfering. We therefore think this rule must be discharged.

Rule discharged.

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MORLEY, Administrator, v. INGLIS and Others.

A plaintiff having given a guarantee for the payment of 1600*l.*, and any other sums which might be advanced to his son by the defendant, a claim in respect of money so advanced on the guarantee, is not the subject of a set-off to a declaration for money had and received, and on an account stated.

DECLARATION for money had and received to the use of the intestate, and on an account stated with him. The defendants pleaded, that in the life time of the intestate, in consideration that the defendants, at his request, had agreed to lend to John Comeridge the younger (the son of the intestate), a sum of 1600*l.*, and would, with the consent of the said John Comeridge, hold the same at the disposal, and place the same to the credit in account of the intestate; and also in consideration that the defendants, at the request of the intestate, would advance to, or for, or on account of the said John Comeridge, such further sums as he might require of the defendants, the intestate, by a memorandum in writing, guaranteed and agreed with the defendants to be answerable to them for the repayment of the said sum, and also any further sums which might be owing to them from the said John Comeridge, and the defendants confiding, &c., did with the assent of the said John Comeridge hold the said sum agreed to be lent, and which was then lent to him by the said defendants on the terms aforesaid, at the disposal of, and place the same to the credit in account of the intestate, and did accordingly then advance and pay the same upon the terms aforesaid, and relying on the said guarantee did afterwards, in the lifetime of the intestate, advance and pay to and for, and on account of the said John Comeridge, divers other sums of money, and although the time for repayment had long since elapsed, and the said John Comeridge had been requested to pay, yet nevertheless he had not paid the said sums of money advanced, of which the intestate in his lifetime had notice, and was requested to pay; but yet the intestate in his lifetime had not paid, nor had the plaintiff, as administrator, paid the same since the death of the intestate. The plea then concluded with a set-off. De-

murrer to so much of the defendants' plea as related to the guarantee, that money claimed to be due on such a guarantee was not matter of set-off.

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Martin, in support of the demurrer.—It was clear, from the plea, that the monies referred to as having been lent by the defendants, had been advanced to the son of the intestate and not to the intestate himself. At common law a debt or other demand due from the plaintiff to the defendant, or any other cross demand, was no answer to the claim of a plaintiff, and the right to set-off such cross debts was given first by the statute 2 Geo. 2, c. 22, s. 13. It was provided by that section "that where there were mutual debts between the plaintiff and the defendant, one debt might be set against the other." One debt therefore might be set-off against another, but this did not apply in all cases. Then, first, a liability on a guarantee was not a *debt*, but it was a collateral liability, affecting the parties only on the default of the principal. This was to be collected from the early authorities (a). The learned annotator in the latter book collected all the authorities upon the subject, and it was said at length, as the principle to be drawn from them, that there must be a special count in an action on a guarantee, and that a general indebitatus assumpsit count would not do. *Butcher v. Andrews* (b), was a strong case in point, and *Marriot v. Lister* (c), was also to the same effect. In *Mines v. Sculthorpe* (d), the same question arose on an indebitatus assumpsit brought for goods sold and delivered to a third person, on a written guarantee given by the defendant, and the Court held that a special declaration was necessary. In *Chitty on Pleading* (e), it was laid down in the same way. Secondly,

(a) 1 Roll. Abr. 594, pl. 30 and
35; 1 Wms. Saund. 211, b.

(b) 1 Salk. 23.

(c) 1 Wils. 141, b.

(d) 2 Camp. 215.

(e) Vol. 1, p. 113.

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there was no case in which money due on a guarantee was made the subject of set-off. There was a general collection of subject-matters of set-off in Chitty on Pleading (a), but a liability on a guarantee was not among those mentioned, and the present attempt appeared to be the first which had been made to treat such a liability as subject-matter of a plea of set-off. In the case of *Crawford v. Stirling* (b), in which it was distinctly held that a liability on a guarantee was not matter of set-off, and that case was precisely parallel with the present. Here the liability was the loan to John Comeridge the younger, and nothing appeared but the simple guarantee to support it. The reasons which were given for the decision in *Crawford v. Stirling* applied here, and that case was therefore decisive; and although it was only a Nisi Prius decision, it was one which had been frequently acted upon, and had never been questioned. It was to be gathered from *Howlet v. Strickland* (c), that the opinion of the Court was, that the subject-matter of a set-off must be a defined and ascertained debt. These authorities were besides supported by many others. Com. Dig. tit. Debt. B., *Weigall v. Waters* (d), *Colson v. Welsh* (e), *Hutchinson v. Reid* (f), *Hardcastle v. Netherwood* (g), *Cooper v. Robinson* (h), (which was a very strong case in point), *Grant v. The Royal Exchange Assurance Company* (i). *Cope v. Joseph* (k), was a case in which a contrary opinion had been expressed by Mr. Baron Wood, but it appeared to have been given extra-judicially, and quite without any consideration of the decisions upon the subject. In that case, the defendant was held to bail on a guarantee, but by the old common law, arrest was only permitted in cases of

(a) Vol. 3, p. 798.

(b) 4 Esp. 207.

(c) Cowp. 56.

(d) 6 T. R. 488.

(e) 1 Esp. 378.

(f) 3 Camp. 329.

(g) 5 B. & Ald. 93.

(h) 2 Chitt. Rep. 161.

(i) 5 M. & Sel. 439.

(k) 9 Price, 155.

violence. In Black. Com. (a), the law on the subject of arrest was laid down, and the history of its progressive changes was to be found. The present law, however, was governed by a series of statutory enactments, commencing with 12 Geo. 1, c. 29, by section 2 of which it was provided, that no arrest should be made except on affidavit of the plaintiff's *cause of action*, and affidavit of *debt* was not mentioned. *Collins v. Wallis* (b), was a case to which the same reasoning would apply.

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Sir *William Follett*, in support of the plea.—By the form of the plea, the nature of the set-off was, first, in consideration that the defendants, at the request of the intestate, had agreed to lend and advance 1600*l.*, and, with the consent of the son, to hold the same at the disposal, and place it to the credit of the deceased; so that the money was at the disposal of the intestate, and it must be inquired what effect this would have on the old authorities. The right of set-off was undoubtedly dependent upon the construction to be put on the statute, and upon the meaning to be given to the term “mutual debts;” but he apprehended that that expression was to be taken in its ordinary signification; and the sum being ascertained which was alleged to be due from one to the other, it was a “mutual debt,” and a proper subject of set-off; for, when the sum was ascertained, there was no necessity for the introduction of a jury to assess damages. He admitted that where an action in *assumpsit* or *covenant* was brought to recover unliquidated damages, so that the amount to be recovered was to be ascertained by the jury, no set-off could be alleged; and so, also, a set-off could not be pleaded, the amount of which was uncertain; but the amounts on both sides must be defined and ascertained, in order to entitle the defendant to his set-off. It had been

(a) Vol. 3, p. 281.

(b) 11 Moore, 248.

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contended, that a claim on a guarantee was not a subject for an action of debt, and that debt could only be maintained for a sum certain. This latter was not the only criterion, however, by which it could be judged whether debt would lie; and it by no means followed that, because debt would not lie in a particular case, that the claim would not be subject of set-off. In Com. Dig. tit. Debt, many cases were given in which debt would lie, and would not; and, besides, many cases were cited, where it was said to lie, and where it would be doubtful whether a set-off could be supported; and, on the other hand, there were many cases where a claim would undoubtedly be subject for a set-off, and where debt would not lie. The meaning of the term "debt" was, that something was owing from one to another, and, no doubt, the amount must be liquidated. Debt would not, in all cases, lie against the acceptor of a bill of exchange: *Priddy v. Henbrey* (a); as it would not lie against the acceptor by the indorsee: *Cloves v. Williams* (b); but a debt due on a bill of exchange was subject-matter of a set-off: *Cornforth v. Rivett* (c). By the Bankrupt Act, 6 Geo. 4, c. 16, s. 50, the liability under a guarantee was allowed to be set-off against a debt due to the bankrupt. The words of the statute were, "Where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state an account between them, and one debt or demand may be set against another." In the old statutes, the word "demand" was not inserted. *Rose v. Hart* (d) was a decision, that, under the term "mutual credits" and "mutual debts," alluded to in the 5 Geo. 2, c. 30, s. 28, a general lien was not included; but that decision was given under the impression

(a) 1 B. & Cr. 674.

(b) 3 Bing. N. C. 868.

(c) 2 M. & Sel. 510.

(d) 8 Taunt. 499.

that the old enactment was still in force; the act of the 49 Geo. 3, c. 121, however, having passed, by which an alteration in the law was made. In the 46 Geo. 3, c. 135, s. 3, the words "debt or demand" were used, and they were continued in the subsequent enactment, 6 Geo. 4, c. 16, s. 50; but the clause in the latter statute, alluding to mutual credit, applied only to transactions which must end in debts: *Rose v. Sims* (a), *Hawkins v. Whitten* (b), *Dickson v. Cass* (c). He would admit, if it should be necessary, that debt would not lie on a guarantee; but that question did not arise. The point in dispute was, whether the liability on the guarantee was matter of set-off. In *Howlet v. Strickland* (already cited), it was said: "debts, to be set off, must be such as *indebitatus assumpsit* would lie for;" but that remark was entirely extrajudicial, and was one, therefore, on which the Court would not depend; but, at the same time, he did not dispute the law of the case, which was undoubtedly good. In *Thorpe v. Thorpe* (d), the Court said: "If the plaintiff had chosen, instead of assumpsit for money had and received, to bring a special action for the breach of duty, there could be no set-off, because it would have been an action for unliquidated damages; but, by bringing assumpsit for money had and received, he lets in the consequences of that form of action, one of which is the right of set-off." *Hutchinson v. Reid* was very like this case; but nearly all the decisions which had been alluded to on the other side, would be found to turn upon the principle, that the cause of action and the set-off must be for liquidated damages, or a set-off could not be admitted. *Fletcher v. Dyche* (e) was a case in which it was held, that if two persons agreed to perform certain work in a limited time, or to pay a stipu-

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(a) 1 B. & Ad. 521.

(b) 10 B. & C. 217.

(c) 1 B. & Ad. 343.

(d) 3 B. & Ad. 580.

(e) 2 T. R. 32.

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lated weekly sum for such time afterwards, if it should remain unfinished, and a bond was prepared in the name of both, but executed in the name of one only, with condition for the due performance of the work, or the payment of the weekly sum, and the work was not finished in time, such weekly payments were not by way of penalty, but were in the nature of unliquidated damages, and might be set off by the obligee in an action brought against him by the obligor, who executed.

Martin replied.—In the plea, the money was only alleged to be lent to the son, and the liability, therefore, of the intestate was only collateral, and not direct, for the debt was due from the son, and not from the intestate. A verdict need not be given against the guarantor for the full amount in all cases; as in the case of the original party being solvent, and the action being brought against the guarantor immediately on default being made; at least it was more than probable that the Court would direct the jury that they need not find for the whole sum. This suggestion was borne out by *Crawford v. Stirling* and *Hardcastle v. Netherwood*.

TINDAL, C. J.—It appears to me that this plea of set-off cannot be supported. The statute provides, that “when there are mutual debts between the plaintiff and defendant, one debt may be set against another.” I will not lay down the broad principle, that debt, as referred to in the statute, shall be so strictly defined as to mean such claims only as those for which actions of debt will lie; nor do I think that it is necessary to go through the numerous cases which have been cited; but my opinion is, that the question in cases of set-off is, whether it sounds in damages; whether the amount is ascertained; in fact, whether the damages are liquidated. Here, the contract does not appear to be within these conditions, for the simple

facts appear to be, that the intestate undertakes to become responsible to the defendants for 1600*l.*, which they should advance to his son, and for any further sums which might be lent to him. Now, in that case, it is evident that there was no ascertained sum for which the intestate made himself liable; and, as I think, no sum can be defined without the intervention of a jury, because, independently of any sum which might be advanced exceeding 1600*l.*, there will also be a question on the amount of further damages consequential on the non-performance of the contract by the son, and for interest. If the defendants were to sue upon the guarantee, they must do so in special assumpsit, and allege the special damage. Then, if such an action were brought, the debt now sought to be recovered by the plaintiff could not be set off against it. In the cases cited on behalf of the defendants, the damages have been liquidated damages, where a set-off has been allowed. *Cope v. Joseph* and *Collins v. Wallis* were not cases of set-off. Independently of the grounds on which I have given my judgment, I should have considered myself bound by the case of *Crawford v. Stirling*.

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VAUGHAN, J., concurred.

BOSANQUET, J.—I am of opinion that the sums respectively claimed by the plaintiff, and sought to be set-off by the defendants, are not “mutual debts,” within the statute. The son of the intestate, it is clear, is the debtor in the case, and the liability is merely collateral.

COLTMAN, J.—My impression has always been, that such a claim as that made here by the defendants is not subject of set-off; and my opinion is now confirmed by that expressed by the Court in the case of *Crawford v. Stirling*.

Judgment for the plaintiff.

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Judgment cannot be entered nunc pro tunc pursuant to 3 Reg. Gen. H. T. 4 Will. 4, (Pleading Rules), except where the delay arises from the act of the Court.

The plaintiff obtained an order, by consent, to enter up judgment on a certain day, but neglected to take advantage of the order in consequence of proceedings taken to issue a fiat of bankruptcy against the defendant, and the latter having died before the fiat was issued, judgment nunc pro tunc was not allowed to be entered up.

WILDE, Serjt., had obtained a rule, calling on the plaintiff to shew cause why an order made by Mr. Justice *Vaughan* should not be rescinded, and why judgment which had been entered up nunc pro tunc, should not be set aside. It appeared, that the action was brought by the plaintiff as drawer of a bill of exchange for 151*l.*, against the defendant as acceptor. The defendant was arrested on the 3rd May, and bail was put in on the 12th. The plaintiff then delivered his declaration, and on the 26th, the defendant pleaded that he had not accepted the bill. Issue was joined, and the cause was set down for trial, for the first Sittings in Trinity Term, but it was continued until the next Sittings. An application was then made by the defendant's attorney on an affidavit, in which it was sworn that the defendant was insolvent, and that a meeting of the creditors had been held on the 15th May, at which the plaintiff and one Smith, another creditor, who also had an action pending against the defendant, were present, and that it was found that the defendant's estate would pay 7*s.* in the pound by instalments. It was then agreed, that the affairs should be placed in the hands of a committee of creditors, and that the plaintiff and Smith should not go on with their actions, until a report was made. On the 24th May the committee made a report, but Smith on the 30th obtained a consent from the defendant's attorney, and signed judgment. There was another meeting of the creditors held at the beginning of the month of June, and the issue of a fiat was determined on, and the necessary proceedings were in consequence taken, the plaintiff being petitioning creditor. The plaintiff then on the 6th June obtained an order from Mr. Justice *Park*, with the consent of the defendant's attorney, that the defendant should be at liberty

to withdraw his plea, and that the plaintiff should have judgment; the fiat was to have been issued on the 9th June, but on the 8th, the defendant died. The plaintiff then on the 22nd June obtained an order from *Vaughan, J.* for entering up judgment nunc pro tunc, and it was this order and judgment that it was now sought to set aside, the rule having been obtained on behalf of the general body of creditors.

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Talfourd, Serjt., shewed cause and produced an affidavit in answer, in which it was sworn, that the plaintiff attended the meeting of creditors on the 19th May, and that the creditors were dissatisfied and refused to accept the composition, unless security was given. It was contended that the fiat of bankruptcy having been subsequently superseded by the death of the defendant, the plaintiff was remitted to his original position, and his consent therefore to become the petitioning creditor would not alter or take away his right in the action. If the cause had been tried in Trinity Term, there was no doubt he would have obtained judgment, and he was surely therefore entitled to be now in as good a position as that in which he would then have been placed. There was no violation of good faith on his part, but on the part of the defendant there was; for the attorney of the latter had given a consent to Smith that he should have judgment, contrary to the agreement which had been entered into. He referred to 3 Reg. Gen. H. T. 4 Will. 4, (Pleading Rules) (a).

Wilde, Serjt. in support of the rule.—The real question was, whether the plaintiff was entitled to have the preference. The delay which had taken place was the voluntary delay of the parties, in anticipation of what was about to take place. The plaintiff, by the terms of the order of

(a) Ante, Vol. 2, p. 313.

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Mr. Justice *Park*, was to have judgment forthwith, and the proceedings were to have been stayed until the 13th June. The fact of not signing judgment was the act of the party, and not of the Court, and it was clear under the rule that in such a case judgment could not be signed nunc pro tunc. The plaintiff therefore had lost his right by his own laches. Besides, the original consent was that the plea should be withdrawn, but that was not done, and then it was said that the practice of the Court did not require it. What reason was there in law which prevented the plaintiff from signing judgment on the 6th June? If he postponed taking judgment to save expense, it was his own act, and the Court could not interfere, for there had been no agreement that it should be postponed. All the surrounding facts of the case had no effect, and the point was to be considered merely as if leave had been given to sign judgment on a particular day, and the plaintiff having postponed taking advantage of his right, the defendant in the mean time died. That was precisely the present case, and the plaintiff would not be entitled to come to the Court and say, that he was entitled to judgment nunc pro tunc, and he must suffer by his own neglect. The plaintiff besides was only entitled to sign judgment where the pleas were withdrawn; they were not withdrawn here, and he could not therefore have judgment. There must be some withdrawal of the pleas, but here, there had been none, and the plaintiff was not in a situation to sign judgment, even before the death of the defendant. He cited *Lambirth v. Barrington* (a), *Hopwood v. Watts* (b), and *Tidd's Practice* (c).

TINDAL, C. J.—This case, which depends on the construction to be put on the new rule of Court, must be determined in reference to the power which the Court has

(a) 2 Bing. N. C. 149.

(b) 5 B. & Adol. 1056.

(c) 9th edit. 933.

been found to exercise in analogous cases. The general rule is, that judgment cannot be entered up against a party after his death. There is no doubt, that where the parties have been delayed by the act of the Court, protection may be extended to them in consequence; but there is the case of *Lawrence v. Hodgson* (a), where judgment having been omitted to be entered up, through the laches of the parties, the Court refused to interfere. Now, here, judgment should have been entered up on the 6th June: the defendant died on the 8th, and then the plaintiff calls on us to say, that he was entitled to judgment on the 13th, after the defendant's death. It is to be observed, that by our so doing the administration of the effects would be affected. Therefore, this case being one of laches, though not an ordinary one, it seems to me that the plaintiff has no right to call on the Court to exercise its authority, by granting him permission to enter up judgment.

VAUGHAN, J.—I am very much disposed to concur with the judgment of the Chief Justice. We are here to consider a statutory rule, by which judgment must be entered of record, of the time when signed, provided, that it shall be competent for the Court or a judge, to order judgment to be entered nunc pro tunc, under certain circumstances, and I have not collected that there is any authority to impeach the power of the judge. I hope I am never slow to retrace my steps, where I find on argument, that I am wrong; but I think that a sound discretion was exercised at chambers, for I believe the plaintiff never intended to relinquish the advantage he had gained, and I have no doubt, that if he had thought the fiat would have proved abortive, he would have stood still, and have signed judgment. The question then comes, whether having had the opportunity to secure that which was his right,

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(a) 1 Y. & Jer. 368.

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and having neglected to avail himself of it, the Court will step out of the way in order to give him relief? And I think it is better to abide by the decisions, which have been pronounced where the laches of the parties has interfered; for, the great body of the creditors are here struggling against the advantage obtained by the plaintiff, and I think therefore that the order should be rescinded.

BOSANQUET, J.—I think this case does not fall within the rule of 3 Reg. Gen. H. T. 4 Will. 4. It is the case of an agreement between the parties before the death of the defendant, that the defendant should withdraw his plea, and that the plaintiff should be at liberty to enter up judgment on the 6th of June. There was nothing to prevent this being done on the day, but the plaintiff's own laches,—there was no delay caused by the Court, but it was entirely the plaintiff's neglect, in not taking advantage of the agreement, which entitled him to judgment on a certain day. There was nothing beyond the agreement which gave him a right to judgment; there was no verdict, and in the interim the defendant dies. Now the provision of the rule of Court is this—"All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day. Provided, that it shall be competent for the Court or a judge, to order a judgment to be entered nunc pro tunc." That rule gave rise to the necessity of the plaintiff's going to a judge, to ask for judgment nunc pro tunc, by which it would have relation to a former day, and there are some cases, in which it becomes necessary that it should be so, where the delay is not the act of the party, and where therefore it would be unjust, that he should fall within the general provisions of the rule. Here, the party has signed judgment after the death of the defendant, in order to have the advantage of its reverting to a former day, but I think that it is not within the rule.

COLTMAN, J.—There are some circumstances here which induce me to think, that it would be a convenient and proper course, to give the plaintiff the relief which he seeks, because although the laches is that of the plaintiff, yet it appears to me, that he acted with a proper motive in order that no expense should be incurred in taking a course which might prove abortive. But it does not appear to me, considering the death which has intervened, and the alteration which that makes in the character of the parties, that the Court should grant this favour; and regulating the decision by a just examination into the positions of all the parties, I do not think that it would be right to affect them all, by deciding that the judgment was right.

Rule absolute.

BULNOIS v. M'KENZIE.

SIR F. POLLOCK had, on a former day in term, obtained a rule calling on the plaintiff to shew cause why an order of Mr. Justice *Park*, bearing date the 14th June, and an order of Mr. Justice *Vaughan*, bearing date the 22nd June respectively, should not be rescinded. The action was brought by the plaintiff as assignee of a patent granted to one Moses Poole, for certain improvements in respect of the formation of public vehicles called cabs, and an infringement of the plaintiff's rights under the patent was alleged in the declaration. The defendant pleaded several pleas, directed to impeach the validity of the patent, and under the 5th section of the New Patent Act, (5 & 6 Will. 4, c. 83), served the plaintiff a notice of the particulars of the objections on which he intended to rely at the trial. That section provided

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Under the New Patent Act (5 & 6 Will. 4, c. 83), the Court has the power to order amended particulars of objections intended to be urged by the defendant at the trial to be delivered, but *semble*, that, when the defendant has in his first notice alleged the invention to be old at the time of granting the letters patent, and to have been used by J. H. M., and divers other persons, it can-

not require the names, addresses, and descriptions of the persons intended to be called at the trial.

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"That in any action brought against any person for infringing any letters patent, the defendant, on pleading thereto, shall give to the plaintiff, and in any scire facias to repeal such letters patent, the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action, and no objection shall be allowed to be made on behalf of such defendant or plaintiff respectively at such trial, unless he prove the objections stated in such notice, provided always that it shall and may be lawful for any Judge at Chambers, on summons served by such defendant or plaintiff on such plaintiff or defendant respectively, to shew cause why he should not be allowed to offer other objections whereof notice shall not have been given as aforesaid, to give leave to offer such objections, on such terms as to such Judge shall seem fit." In pursuance of this statute, the defendant delivered a notice to the plaintiff, stating his objections to be; first, that the alleged invention mentioned in the letters patent and in the declaration, was not, at the time of the granting of the said letters patent, a new invention within this realm. Secondly, that Moses Poole was not the first and true inventor of the improvements. Thirdly, that the said Moses Poole, at the time of the granting of the said letters patent, was not in the possession of any invention in the improvement in the description of public vehicles called cabs. Fourthly, that at the time of granting the said letters patent, the said invention was used, and had been used by divers persons, within this realm. Fifthly, that the alleged improvement was not a new invention, as to the public use and exercise thereof. Sixthly, that the said Moses Poole did not, in his specification, particularly describe the nature of the supposed new inventions, within the true intent and meaning of the said letters patent, and the proviso and condition thereof, and that he did not, in his specification, shew in what the im-

provement consisted, and that the specification was in other respects uncertain and informal.

This particular was considered insufficient, and the plaintiff's attorney, in consequence, took out a summons at chambers, and, on the 14th June, obtained an order from *Park, J.*, requiring a further and better account of the objections intended to be relied on by the defendant, to be given to the plaintiff within two days.

On the 15th June, therefore, a further notice was given by the defendant's attorney, in which the first three objections were stated afresh. It then went on to allege, Fourthly, that at the time of granting the said letters patent, the said invention was used, or had been used, by one James H. Mann in England, and by divers other persons in other parts of the kingdom. Fifthly, that the said Moses Poole did not, by an instrument in writing, pursuant to the said letters patent, particularly describe and ascertain the nature of his supposed invention; and that every matter or principle set forth in the specification was, at the time of granting the said letters patent, already known to the public, and open to the public use; and that there was no new combination of such matters and principles set forth in the specification. Sixthly, that vehicles with two wheels, drawn by one horse, and capable of holding two persons, with a doorway or entrance behind, as described in the said specification, were well known and were in public use before the granting of the said letters patent; and that in the specification it was not shewn wherein the application of the supposed invention consisted.

This notice being also considered insufficient, another summons and order were, on the 22nd June, obtained from *Vaughan, J.*, wherein the defendant was directed to deliver to the plaintiff, within one day, the address and description of James H. Mann, referred to in the last notice, as well as the names, descriptions, and places of abode of the

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several persons alluded to, as having used the invention, before the making of the letters patent, together with the dates when the said inventions were used; and also to give further and better objections in lieu of the 4th, 5th, and 6th objections in the last notice; and in default thereof, it was further ordered, that the defendant should be precluded from calling any person at the trial as a witness in support of the said further objection.

On this another notice was delivered by the defendant, and it was objected, first, that the supposed invention was not new within this realm, and that the main frames, axletrees, shape of body, doorway, steps, windows, blinds, &c., mentioned in the said letters patent, were not, nor was either of them, new within this realm at the time of granting the letters patent. Secondly, that Moses Poole was not the first inventor of the improvements. Thirdly, that the specification did not point out the exact nature of the invention, and whether it was all new, or part new and part old, or whether it was a combination of old and new inventions, or a new combination of old inventions. The notice then went on further to apply the same objection specifically to each portion of the cab, and concluded by setting forth the address and description of James H. Mann.

Wilde, Serjt., and *Hoggins*, now shewed cause, and said, that the present rule had been obtained on two grounds—first, that a Judge had no power to make an order under the statute in reference to the particulars, and that the defendant might give notice of whatever objections he pleased; and, secondly, that if such a power existed, it must be exercised in a wholesome and just manner, but that in this case it had not been so exercised, for that the notices which were given by the defendant were sufficiently in compliance with the act of Parliament. It was contended now, however, that all the Courts had a general

jurisdiction in regulating the proceedings in causes, with a view to justice being eventually secured to the suitors, and that they, in consequence, had the power of directing particulars to be given either by a plaintiff or a defendant in an action. The rules by which these particulars were required and were regulated, were made, not in pursuance of any statute, but of the general jurisdiction which the Court possessed, the extent of which, as exercised over causes, was considerable. Courts frequently compelled plaintiffs and defendants to produce documents; and in one of the earliest cases on the subject, a principle of equity was imparted into the decision which was given, for the Court decided that if the defendant held a document, in which the plaintiff had an interest, a lease for instance, and the production of which was necessary in order that the plaintiff might commence an action, its exhibition would be compelled: *Blakey v. Porter* (a). Both plaintiffs and defendants had been compelled, under the authority of the general jurisdiction of the Court, to produce documents in their respective possession. In ejectment founded on a forfeiture by breaches of covenant, the Court would compel the plaintiff to give particulars of the breaches; and that was founded on the general principle (b).

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VAUGHAN, J.—But that is the case of a plaintiff; and there, in the event of disobedience, the Court have the means of staying proceedings.

Wilde, Serjt.—If the Court had jurisdiction over the plaintiff to stop him, they surely had equal power over the defendant, and there could be no proper distinction made between the two cases. If a defendant pleaded a matter with such generality and indistinctness as to time and place, there was no greater difficulty in requiring him to

(a) 1 Taun. 386. (b) See *Sowter v. Hitchcock*, ante, Vol. 5, p. 724.

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give particulars, than there was in calling upon a plaintiff under similar circumstances. The Courts had a general superintending jurisdiction over both plaintiffs and defendants; and the former, by entering an appearance, and the latter, by pleading, acknowledged that jurisdiction, and their liability to it. In an action for breach of covenant in an indenture of articles of service, if the defendant pleaded counter breaches by the plaintiff, by which the breach alleged against him was justified, he would be compelled to give such particulars as would be necessary to apprise the plaintiff of the nature of the breaches and the dates of their being committed. So, also, where a plea alleged matters depending on time and circumstances which the plaintiff could not meet without some information on the subject from the defendant, he would be entitled to have particulars. In an action on a deed, a plea being pleaded of a lien for money lent, particulars would be required of the defendant; and in an action for breach of contract in not completing the purchase of an estate, the defendant having pleaded a bad title in the plaintiff, would undoubtedly be called upon to give particulars of the objections which he made to the title. The existence of the general jurisdiction was clearly shewn by the whole of these cases; but further, the statute of set-off was clearly in point, for every argument which could be employed against the provisions of that act and a plea of set-off, could be used here. The statute 2 Geo. 2, c. 22, s. 13, enacted, "That where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require; so as at the time of pleading the general issue, where any such debt of the plaintiff, his testator, or intestate, is intended to be in-

sisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue."

No jurisdiction was given to the Court by this statute ; but there could be no doubt that a jurisdiction had been exercised in cases of set-off, and that the Court had required full particulars of set-off to be given by defendants. The case, as regarded the Patent Act, was even stronger than that under the statute of Set-off, for there was a provision that a Judge should have a certain power. The second question was, as to the sufficiency of the notices of objections given. No one who read them could fail to see that they were exceedingly general in their terms, and it was obvious that the object of the parties had been to evade the intent and meaning of the statute.

VAUGHAN, J.—It is difficult to say that we can compel the defendant to state the evidence he intends to bring forward for his defence at the trial.

Wilde, Serjt.—To a certain extent, the plaintiff was entitled to know what was his defence ; as, for instance, he was entitled to know when and where the invention was used. He was entitled to dates, and some specific information on the subject, by which he would honestly be put in the position which was intended by the statute. The act must not be evaded by generalities, and there was a duty required at the hands of the Court, which was to see that the plaintiff had good and fair notice of the objections intended to be urged. The orders which had been made were therefore right in requiring further particulars, for the notices alleged only that the cabs had been used by many persons, who were not named. One name was given, and the defendant would be entitled to give

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evidence now as to that one ; but he could not go into the user by any others. The Courts had long exercised the jurisdiction suggested, and the rights of the parties had been secured by its exercise ; and it had now, in fact, become part of the law of the land. The particulars which were given were vague and uncertain, and appeared to have been formed with a view to defeat the objects of the act of Parliament ; and the granting of the orders, therefore, was just and regular.

Sir *F. Pollock*, and *R. V. Richards*, in support of the rule.—The question was, whether the Court would exercise the power it was called upon to put in force. There was no case in which the power had been exercised in the case of a patent, but there was no doubt that many decisions were in the books where the plaintiff had been called upon to do certain acts, and where proceedings had been stayed until they were done. The power, for instance, had been exercised in cases of giving security for costs, or where the Court had imagined that the process was used for the purpose of oppression, or under any other circumstances in which the interposition of the Court was thought to be necessary to support its own dignity. Cases of plaintiffs and defendants, however, were widely different. The whole proceedings in the cause were under the command of the plaintiff, and the defendant was at his mercy. When, therefore, the cause had once gone to trial, or was complete in its stages, he was unable to stop it. It would be inconvenient in the extreme to fix another term on a defendant, by calling on him to lay open his case to the plaintiff. It was clear that the Judges had no power conferred on them by the statute, but the act was silent on the subject ; and if, therefore, they desired legally to possess themselves of a jurisdiction, which they appeared to have obtained by usurpation, they must pursue the proper

course. In cases of set-off, the jurisdiction of the Court stood on a particular footing; but, even then, the Court would not compel such particulars to be given as were required here. In cases of set-off, the defendant could never be called upon to give the particular name, description, and place of abode of every clerk or servant to whom he intended to allege the payment of money; but the sum, together with such facts as were necessary to identify it, was all that need be specified. Surely, the Court would not here call upon the defendant to give the name of every person who had used the cabs, which were made on the plan of the invention claimed under the alleged patent. Cases of set-off were not analogous to the present question at all. They were considered, and justly so, quasi cross actions brought by the defendants against the plaintiffs in the suit; and, besides, a defendant need not then avail himself of the statute, but might bring his action in the usual form. It was impossible, in this case, to comply with the order of Mr. Justice *Vaughan*. What did it require? That the names and addresses of all the persons who had used cabs of the description alleged to have been invented by the patentee, should be given. This the defendant could not do; but, at the same time, the defendant would not be entitled to give the user of the cabs by them all in evidence, and he was in a position even worse than that of the plaintiff; for if, on the day before the trial, he should discover fresh evidence, he would be precluded from producing it, because he had not given notice of it. [*Tindal*, C. J.—You are entitled, under the act, to amend your particulars.] But the party would be bound by the discretion of the Judge to whom he should apply.

TINDAL, C. J.—This is an application to rescind two orders made in the progress of the cause by Mr. Justice *Park* and Mr. Justice *Vaughan* respectively on the 14th

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and 22nd of June. The first is an order for a further and better set of objections, in the nature of particulars, than that which had been already delivered to the plaintiff by the defendant; and this order having been complied with, it will be unnecessary to enter into an examination of the circumstances attending its being granted, or to set it aside. The other order has already also been partly complied with. It requires that the name and address of a man, who had before been referred to, and of other persons, who were also alluded to, as having used the invention before the plaintiff's patent, should be set forth; and as the defendant has given the address of this first-named person, it would be useless to rescind that portion of the order. The only other point is, as to whether the remaining part of the order should be allowed to stand, or not. Now, I feel no doubt whatever as to the power of the Court in modelling the proceedings of the suitors, and in directing the extent of the particulars of objections required to be given, in accordance with the established practice; and I must object to the use of that word "usurpation," and I think that it must have been used unadvisedly by the learned counsel; for I am sure that no one can see the proceedings of the Courts in Westminster Hall, without seeing the care with which all cases are considered, and especially in those where, without the intervention of the Court, the suitors would be put to great inconvenience and expense, and perhaps would be driven to a court of equity; and I cannot but say that the proper exercise of the jurisdiction referred to has been, and is, most beneficial to all parties before the Court. The question here is, whether the jurisdiction extends to orders made on defendants; and I think, on looking at the statute, that this case is clearly and closely brought to the same position as a case under the statute of Set-off. As there has been an invariable course of applica-

tions for particulars in such cases, I cannot see any objection to the Court looking into the construction of particulars delivered, and in saying whether they are sufficient; and, in a case under the Patent Act, they must be brought within the 5th section. At the same time, however, there is so much generality in the terms of that section, that there is some doubt left in my mind as to how we can compel a party to name the particular persons who, he intends to allege, have used the invention. The words are, "the defendant shall give a notice of any objections on which he means to rely at the trial of such action;" and there is some degree of doubt how far the word "objection" binds a party to particularity in the names of persons whom he intends to call as witnesses; and the Court think that it is better to leave that part of the question open, as it has hitherto been, and to rescind the order as to so much as requires the names of the other persons, besides James H. Mann, to be given; and then, when the case comes on for trial, if any should be called, the Judge will receive their evidence or not in his discretion, and so lay himself open to a bill of exceptions. I think it would have been better for the defendant to permit it to be decided in the course of the cause, than to adopt the more expensive proceeding; but, at the same time, it is a course which he is undoubtedly entitled to take.

VAUGHAN, J.—I confess, after all the arguments that have been employed on both sides, that I am by no means unwilling to say that the construction which I put on the act of Parliament was an improper one. When the parties were before me, they made no objection to the general jurisdiction of a Judge, but they came each with the statute in his hand, and called my attention to it. I looked at it, and I thought that it was better to put that construction on it which was most reasonable; and I thought

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that the proviso in the 5th section would have been treated by this Court as it was treated by me. Then, with regard to the notice which was given, what information does it convey? It says that James H. Mann and others had used the invention. Then, who are the others? Any person may be called at the trial, without the possibility of the plaintiff giving any answer. I conceive that the object of the Legislature was to alter and prevent this, and to require that some information, more specific than that which is furnished by the plea, should be given; but I should be very glad to have the matter discussed in some more solemn way.

BOSANQUET, J.—I do not think that the power in question is to be considered as conferred by the statute, but I think that the Court are here carrying into execution the power which they possess, consistently with the intent and meaning of the act. The practice engrafts itself on the statute, and I think that this case is analogous to a case of set-off. In a case of set-off, the particulars must be given, and not merely the heads; for the defendant is required to state, with some degree of particularity, what the nature of the set-off is, and to give such information as will enable the plaintiff to know what will be brought against him at the trial; but, while he is compelled to do so, he is not required to lay open his brief, and to state all his evidence; but he is compelled to give a reasonably full account of the transactions which he means to prove. I entertain no doubt, then, that the cases are analogous, and that a Judge, therefore, has the power to order a good particular to be delivered in a case under the Patent Act, as well as in a case under the statute of Set-off; and, if the party does not give a fair account, to order a better particular: but I confess I think that it was going a little too far to require the names of all the persons who might be called, to be

given; and I think that more was required of the defendant than the practice of the Court will justify. The case of *Andrews v. Bond* (a) is one which may be referred to on the subject of particulars.

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COLTMAN, J.—I am of opinion that this case must be decided exactly on the principle and according to the precedents in cases of set-off, and I cannot distinguish between them on the point of jurisdiction. I certainly feel a difficulty myself on the statute of Set-off; because, as the particulars of set-off appear on the record, I do not see why the defendant should not give in evidence such as are on the record. The same observation may apply here also, but the point is not material for consideration. The jurisdiction undoubtedly exists, and the only point to consider is, whether it has been carried too far. I think that the particulars delivered were insufficient, because the plaintiff had the whole of England in fact to answer; and I think that some better particulars ought, therefore, to have been required and given, which would meet the justice of the case; but I am of opinion that too much has been called for in requiring the names of all the persons who were alleged to have used the invention.

Rule discharged accordingly.

(a) 8 Price, 213.

BECKHAM v. KNIGHT.

E. V. WILLIAMS had obtained a rule, calling on the plaintiff to shew cause why he should not give security for costs. It was an action on a breach of agreement, the plaintiff having been employed by the defendant as fore-

Where, after joinder in demurrer to the declaration in April, the plaintiff becomes bankrupt in June, but in

September obtains his certificate, the Court will not compel him to give security for costs in Michaelmas Term, the assignees refusing to interfere in the action.

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man of his stereotype foundry, and having, as it was alleged, been suddenly turned away; and the damages sought to be recovered were in the nature of a penalty of 500*l.*, and they were sued for under the terms of the agreement. The action was commenced in January, and on the 28th of that month a declaration was delivered. The defendant demurred to the declaration on the 21st of February, and there was a joinder in demurrer on the 6th of April; but subsequently to this, in the month of June, the plaintiff became bankrupt, but obtained his certificate on the 23rd of September, before the commencement of the present term.

Stammers now shewed cause, and produced an affidavit sworn by the plaintiff, who stated that he was carrying on the action on his own account, and the assignees declined to come in and interfere. There was, consequently, no ground for the present application. The first moment at which the defendant could apply to the Court, was when he had learned that it was the intention of the assignees to come in. *Walkingshaw v. Marshall*(a) was a case in which the plaintiff had become bankrupt before the trial of the cause, and an application for security for costs was rejected, because the defendant had not ascertained the resolution of the assignees to proceed with the action. *Snow v. Townsend*(b) was a case in which the principle of this decision was supported, the Court refusing to set aside proceedings, or to require an insolvent to give security for costs in an action, where his assignees refused to sue. *Morgan v. Evans*(c) was a case in which the Court refused to require the plaintiff to give security for costs, although he was sworn to be an insolvent, and it was proved that the action was brought in his name for the benefit of another, who was alone beneficially inte-

(a) 4 Tyr. 993.

(b) 6 Taun. 123.

(c) 7 B. Moore, 344.

rested in its result. In *Manley v. Mayne* (a), security for costs was required, but the action was continued by the assignees of the plaintiff. The plaintiff here was certificated, and no difficulty could therefore arise, in the event of his obtaining a verdict. The Court besides would not order security to be given, where the equity of the case was against the application; and *M' Cullock v. Robinson* (b) was an instance in which this principle had been acted upon. There, a commission of bankruptcy had issued against the plaintiff, who was gone abroad with his family, upon the petition of the defendant, who was the only creditor, and had chosen himself to be assignee; and the plaintiff having brought an action to try the commission, the Court refused to stay proceedings, until security for costs was given. The general principle to be acted upon in such cases was to be found in the judgment of *Chambre, J.*, who said, "By the general rule of law, every man, not legally incapacitated, may sue without giving security for costs. But the Court has interposed in certain cases, and required security. This, however, is matter of discretion." Now the present case was one, in which the Court would not think it proper to exercise this discretion.

E. V. Williams, contra.—Where the bankruptcy of the plaintiff occurred after the commencement of the suit, it was established by *Kinnear v. Tarrant* (c), and *Biggs v. Cox* (d), that the defendant might plead it in bar to the action. But if that were done, a new action must be brought by the assignees in their own name, and therefore the course which had been here adopted was the most convenient one. The question was not one of the assent or dissent of the assignees, but whether, in law, the plaintiff ought not to be compelled to give security for costs. There could be no doubt that here the cause of action vested in the

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(a) Man. & R. 381.

(b) 2 N. R. 352.

(c) 15 East, 622.

(d) 4 B. & C. 920.

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assignees for the benefit of the creditors, as the right to it accrued to the plaintiff before the commencement of the action; and the principle to be derived from *Mason v. Polhill* (a), was, that those who were to benefit by the proceedings were to be liable for the costs. That was a case in which the plaintiff became bankrupt in the middle of the cause, and the assignees, it was held, if they proceeded with the action, must give security at any time at which the defendant might apply, before a fresh step was taken. In *Webb v. Ward* (b), the cause of action accrued after the bankruptcy, and the Court held that, as the result of the action must be for the benefit of the assignees, the defendant was entitled to security for costs.

TINDAL, C. J.—There seems to be no case in which security has been required after the bankrupt has obtained his certificate.

E. V. Williams further cited *Doyle v. Anderson* (c), and *Heaford v. Knight* (d). *Snow v. Townsend* was at variance with the other cases, and it was, in some respects, unintelligible. No reliance therefore could be placed upon it.

TINDAL, C. J.—It appears to me that this case rests on its own peculiar circumstances, and we can form no general rule on it for the government of other cases. Here, after an issue in law has been joined in the action, the plaintiff becomes bankrupt, and not until after he has obtained his certificate is any application made to the Court for security for costs. It might be, that if the case rested there, the parties would have been obliged to give security; but there is another circumstance, namely, that it is denied that the assignees will come in and interfere with

(a) Ante, Vol. 2, p. 61.

(b) 7 T. R. 296.

(c) Ante, Vol. 2, p. 596.

(d) 2 B. & C. 579.

the action. It seems to me then to be a case which may be considered to be within the circumstances and principle of *Snow v. Townsend* as reported in 1 Marshall, 477. That was a case in which the party became insolvent, and, having assigned his property, brought an action to recover a debt incurred before the assignment. The assignees having declined to sue, however, the Court refused to set aside the proceedings in the action, or to compel the plaintiff to give security for costs; and *Gibbs, C. J.*, said, in reference to the case of *Webb v. Ward*: "In that case the assignees were suing for their own interest in the name of the bankrupt; the present action, on the contrary, was brought because the assignee had refused to sue." The present case then, I think, comes within that decision.

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VAUGHAN, J.—I am of the same opinion. The principle, that wherever the benefit is to result to another party beside the plaintiff, security for costs must be given, has been put too broadly; and the possibility that the result of the action might be for the benefit of another party, is not a sufficient ground for the application.

BOSANQUET, J.—I am of the same opinion.

COLTMAN, J., concurred.

Rule discharged.

TUCKER v. NECK.

MANSELL moved for a rule directing the Prothonotary to tax the plaintiff's bill of costs under the following circumstances:—It was an action on an attorney's bill, and the cause having gone down to trial at the sittings after

Where, in an action on a bill of costs, a verdict is taken by consent for the plaintiff, subject to the taxation of the

bill within the first five days of the next subsequent term, and the defendant omits to adopt measures to procure the taxation of the bill, the plaintiff is entitled to sign judgment in the ordinary way, and to tax his bill of costs in the action.

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T. T., a verdict was taken for the plaintiff by consent, subject to the taxation of the bill of costs within the first five days of the present Term. The defendant, however, neglected to take any steps to procure the taxation, and on the 13th of November the plaintiff proceeded to tax his bill in the action. The defendant objected to this course being pursued, and contended that the bill should have been taxed within the first five days of Term; and, under these circumstances, the Prothonotary made no allocatur until the decision of the Court on the present application should be learned. It was now submitted, on the part of the defendant, that the plaintiff was bound to have his bill, on which the action had been brought, taxed within the first five days of Term, and that the amount of that bill must be determined before the bill in the present action could be taxed.

Wilde, Serjt., shewed cause in the first instance, and contended that it was the duty of the defendant to take measures to procure the taxation of the bill of costs within the time specified at the trial. The agreement which had been entered into was one, the effect of which was intended to be favourable to him, and as he had neglected to take advantage of it, he must be considered as having waived his right, and the plaintiff must have judgment in the ordinary way, as if there had been no stipulation whatever with respect to the terms on which it should be obtained.

PER CURIAM.—We cannot accede to this application. The defendant has put his own construction upon the agreement between him and the plaintiff, and in doing so, has let slip the opportunity, of which it was intended he should avail himself, of having the plaintiff's bill taxed within the first five days of Term.

Rule discharged.

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VINE v. SAUNDERS and Wife.

THIS was an action for an assault and false imprisonment, and the declaration alleged that on the 19th of October, 1836, the defendants, with force and arms, &c., assaulted the plaintiff, and then caused her to be taken into custody, upon a false charge of felony then made by the defendants against the plaintiff; and then forcibly compelled the plaintiff to leave the bed in which she was lying, and indecently and indelicately forced her to go from and out of her bed-room in certain night clothes in which she was then dressed, in the presence of divers, to wit, two men; and then caused her to be taken into custody, and forced and compelled her to go in, to, and along, divers public highways to a certain dwelling, and there to be imprisoned, without any reasonable or probable cause, for a long space of time, to wit, for six hours, contrary to the laws and customs of this realm, and against the will of the plaintiff; whereby, &c.

Trespass will lie against husband and wife for their joint act.

General demurrer and joinder.

Petersdorff now, in support of the demurrer, contended that the declaration was bad, in alleging a joint act of trespass, for trespass would not lie against husband and wife, but the husband alone was liable. Although there had been early decisions from which the contrary might be presumed, those were cases in which the objection was not taken until after verdict; and it might be assumed that the trespass was committed by the wife, and that the husband was only joined for conformity. In *Drury v. Dennis* (a), this distinction would apply, as well as in *Draper v. Fulkes* (b), *Tampian v. Newsam* (c), and *White v. Eldridge and Wife* (d). The difference between an

(a) Yelv. 106.

(c) Ibid. 210.

(b) Ibid. 165.

(d) 1 Ld. Raym. 443.

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action of this description and an action of trover was not material, and *Keyworth v. Hill and Wife* (a) was therefore in point. There, the Court assumed, in order to support the verdict, that the conversion might have been by the wife's destroying the goods. But there was a distinct authority that an action upon the joint contract, or joint conversion of husband and wife, after coverture, must be brought against the husband alone, although a joint action might be brought for the distinct acts of the wife: Com. Dig. tit. Baron & Feme, Y. The reason of this was obvious; that the wife could not be held liable for that which must be presumed to be done under the direction of her husband. The wife could not join in an action with her husband for an assault on both, because she would have no interest in the damages recovered, and why, then, should she be liable for his act? The principle he had suggested was to be found in many cases. *Dunwell v. Marshall* (b), *Newton v. Hatter* (c), *Hocket v. Stidolph* (d), *Milner v. Milnes* (e), were all in point.

Addison, contra, submitted that there was a broad distinction between cases of trover and cases of trespass. In trover, the conversion was the gist of the action, and a wife could not be liable for a joint conversion with her husband; but in trespass, where the question of property did not arise, they might be jointly sued for their joint act. Com. Dig. tit. Pleader, 2. A. 2 was an authority that a husband and wife might be charged jointly with battery, and *Berry v. Nevys* (f) was a case which, although it decided that a joint conversion could not be laid, admitted that a joint battery might. The rule which had been adopted in the present action was to be found in *Keyworth v. Hill*,

(a) 3 B. & Ald. 685.

(b) 2 Lev. 20.

(c) 2 Ld. Raym. 1208.

(d) 2 Mod. 66.

(e) 3 T. R. 627.

(f) Cro. Jac. 661.

and must be inferred from *Watson v. Thorpe* (a). There, to an action of trespass against husband and wife for a battery, the wife pleaded non assault demesne, but the Court held that plea to be bad, and nothing was said in objection to the action being against both. The case, however, was clearly decided by *Smally v. Kerfoot* (b). That was trespass against husband and wife for entering the plaintiff's house, taking his goods, and converting them to the use of the defendant; and after judgment by default, it was held that the action would lie.

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Petersdorff replied, and contended that little weight could be attached to the authority in Com. Dig. tit. Pleader, for it was in opposition to that which was laid down in tit. Baron & Feme. The case of *Berry v. Nevys* proved nothing, for there, the objection was raised after verdict, and the same observation applied to *Smalley v. Kerfoot*. Although in *Keyworth v. Hill*, the expression of *Bayley, J.*, was strong, it was extra judicial, and carried little weight, therefore, as the subject had not been fully considered. The objection was of a nature which need not to have been taken in *Watson v. Thorpe*, and it was submitted, therefore, that the Court could not give a decision upon its authority.

TINDAL, C. J.—I think that this action is maintainable against husband and wife. There have been no authorities cited which have led to an opposite conclusion, while those to which our attention has been called on behalf of the plaintiff induce us to arrive at the determination that the declaration is good. There is first the case of *Watson v. Thorpe*; and there, to an action of trespass brought against husband and wife, the wife pleaded non assault demesne, and the husband alleged that he acted in aid of of his wife. The verdict having been found for the plaintiff,

(a) Cro. Jac. 239.

(b) 2 Str. 1094.

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and damages given, the defendants moved an arrest of judgment, and it was contended that the trial was bad, as the wife could not plead by herself, and the Court directed that the parties should replead. Now, if the ground of that decision had been that the Court thought that the action could not be maintained jointly against the husband and wife, they would not have awarded a repleader. *Berry v. Nevys* was an action of trover, and there, the error assigned was, that a conversion could not be laid to the use of both, but it was admitted at once that the husband and wife might have been jointly charged with battery. In *Smalley v. Kerfoot* the same principle was acted upon, and the same distinction was drawn between cases of trover and trespass. That was trespass against husband and wife, and it was alleged that the defendants had entered the plaintiff's house, and had carried off his goods, and converted them to their own use; and after verdict and damages, it was moved, in arrest of judgment, that the joint conversion should not have been alleged; but the Chief Justice said that the action being trespass, it was well enough, for the conversion was not the gist of the action, as in trover, and the damages must be taken to have been given for the trespass. Now that is a direct authority that trespass will lie against husband and wife, and it is not to be impugned by the observation, that it is stated by *Strange* to be after verdict, it being alleged by another reporter expressly to be by default; but the reports do not appear to be necessarily inconsistent, for *Strange* may be speaking of a verdict on a writ of inquiry after judgment by default. Then there is the case of *Keyworth v. Hill*. Now that was an action of trover against husband and wife for a bond and promissory notes, and, upon an objection in arrest of judgment, that the conversion could not be to the use of both, the Court declared that the conversion might be assumed to have been effected by the destruction of

the instruments; so that where the injury need not necessarily have been done by the husband alone, the wife may be joined with him; and that is a distinction which is made in Com. Dig. Pleader, 2 A. 2. Then, besides, there is the judgment of *Bayley, J.*, which is expressly in support of this case, and he said that it was clear that in trespass the husband and wife might be joined.

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VAUGHAN, J.—I am of the same opinion. No direct authority has been cited in favour of the defendants, and on the other hand, *Keyworth v. Hill*, and *Smalley v. Kerfoot*, are expressly in point.

BOSANQUET, J.—I am also of opinion that the judgment in this case must be for the plaintiff. There has been no direct authority brought under our notice in favour of the defendants; at the same time, that several cases, which have been cited, are in favour of the plaintiff. *Watson v. Thorpe*, *Berry v. Nevys*, and *Smalley v. Kerfoot*, are all strong in support of the plaintiff's position. In *Keyworth v. Hill*, the Court said, that the conversion might be by the destruction of the property; admitting, therefore, that if the action had been for such destruction, the husband and wife, if they were both concerned, might be sued jointly. The liability of the wife as to damages, in the event of her surviving her husband, need not be decided; but it is going far to say, that the wife ought to be exempt, if she has been jointly concerned in the injury.

COLTMAN, J., concurred.

Judgment for the plaintiff.

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A bill of exceptions lies to the judge of a county court on a nonsuit.

STROTHER v. HUTCHINSON and Another.

L.C. 4 B. 4 L. N. C. 03. 5 B. 4 340.

THIS was an action of debt for work and labour done by the plaintiff, as surgeon, in attending one Humphery, and it was brought against the defendants in their capacity of overseers of a parish in Yorkshire. The defendants pleaded nil debet, and the cause came on for trial in the county court. On a writ of false judgment, the sheriff transmitted a copy of the record, which set forth the pleadings and the impanelling of the jury, &c., and then alleged that the jury retired from the bar to consider their verdict, and, after having considered thereof, and agreed among themselves, they returned to the bar to give their verdict in their behalf; upon which the plaintiff, being solemnly called, did not further prosecute his writ against the defendants; wherefore it was considered that the plaintiff should take nothing by his said writ, but that he and his pledges to prosecute should be in mercy, and that the defendants should recover of the plaintiff 33*l.* 13*s.* 8*d.* for their costs and charges by them laid out about their defence to the action, and that the said defendants should have execution thereof. The record then alleged the tender of a bill of exceptions to the nonsuit by the plaintiff, in which it was alleged that the action was brought for attendances on Humphery in the time of the overseers preceding the defendants, but that the defendants denied their liability. The plaintiff nevertheless contended that they, in their capacity of overseers, were liable; but that, notwithstanding, the sheriff and suitors declared that the plaintiff had brought his action against the wrong parties, and could not, in point of law, maintain the same against the said defendants; and although the plaintiff, by his attorney, insisted that the cause should be left to the determination of the jury, and appeared on being called, and refused to consent to a nonsuit; yet the sheriff, conceiving

that there was no matter of fact before the jury, did, with the consent of the said suitors, order him to be called, and did there and then declare him to be nonsuited. Wherefore, &c.

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Archbold, on behalf of the plaintiff, contended that a Judge could never nonsuit a plaintiff without his own consent; and *Minchin v. Clement* (a) was a case expressly in point. A writ of error would lie on a nonsuit; and *Box v. Bennett* (b), and *Newell v. Pidgeon* (c), both shewed this; and *Dyer*, 32, a. and b., was to the same effect. Then it was clear that a bill of exceptions would lie to a judge of a county court: 2nd Inst. 426; and Lord *Coke* said there, in reference to the statute, "This act extendeth not only to all other courts of record (besides the King's Bench), but to the county court, the hundred, the court baron, for therein the judges are most likely to erre; and, albeit of judgments given in them, a writ of error lyeth not, but a writ of false judgment in the Court of Common Pleas, yet the case being in the same, or greater mischief, the purview of this statute doth extend to those inferior courts." This, therefore, was clearly in point, the present being a case not of error, but of a writ of false judgment.

W. H. Watson, contra.—A bill of exceptions would only lie where error would lie, Buller's *Nisi Prius*, 316; and error would not lie in the Sheriff's Court, and besides, a writ of error would not lie on a nonsuit. A bill of exceptions, at all events, would not lie on a nonsuit, for the plaintiff was not in Court to tender it. If a return were complained of, there should be a mandamus to the judge to state what occurred. A bill of exceptions would not lie to a county court, for the statute provided, that the

(a) 1 B. & Ald. 252.

(b) 1 H. B. 432.

(c) 1 Str. 235.

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King, on complaint, should cause the record to be brought before him. Now, there was no record in a county court, and the opinion given therefore by Lord *Coke*, was not founded on reason, nor was there any authority given in support of it. In *Rex v. Preston-on-the-Hill* (a), it was laid down, that a bill of exceptions would not lie to an order of Quarter Sessions. The authorities in 1 Starkie's Evidence, 467, were to the same effect.

Archbold, in reply.—Neither the authority in Bull. N. P., nor of *Rex v. Preston-on-the-Hill*, was incompatible with the dictum of Lord *Coke*, for the passage in Buller was very generally expressed, and referred only to such courts as the Quarter Sessions, where the questions which arose were so mixed up with fact as to make a bill of exceptions inapplicable. It had been the practice, from the earliest period, to give the act a liberal construction.

TINDAL, C. J.—This case has been brought before us by a writ of false judgment from the County Court of York, and several objections are made to the legality of the proceedings. First, it is urged by the defendant, that no bill of exceptions will lie to a judge of a county court. Undoubtedly, if we look at the statute of Westminster, the point will not admit of a question; for, as it is set out in the 2nd Inst. 425, it refers to proceedings only before the Justices. But we must look as well to the commentary of Lord *Coke*, which has been uncontradicted until now, and a portion of which has been again and again acted upon. He says, “Albeit, the letter of this branch seemeth to extend to the Justices of the Court of Common Pleas only, by reason of these words, ‘Et si forte ad querimoniam de facto justic’ venire fac’ dominus rex recordum eorum eo,’ (which is by writ of error into the King’s

(a) Rep. temp. Hardw. 231.

Bench); yet that is put but for an example, and this act extendeth, not only to all other Courts of Record, (for upon judgment given in them a writ of error lyeth in the King's Bench), but to the County Court, the Hundred, the Court Baron, for therein, the Judges are more likely to erre; and albeit, of judgments given in them a writ of error lyeth not, but a writ of false judgment in the Court of Common Pleas, yet, the case being in the same or greater mischief, the purview of this statute doth extend to those inferior Courts." I say, that taking this statute to the letter, it is clear that, if we are to be limited by its precise language, no bill of exceptions would lie in the *King's Bench* or *Exchequer*; but yet, according to the every day practice, it lies in both. As we see, then, that there are instances in which this commentary has been held up to the present time to be the law of the land, there is no reason why we should not give effect to it and extend it also to the County Courts. The expressions which are used are not loose, but they are exceedingly precise, exhibiting evidently, therefore, that the mind of the commentator was at work on the subject at the time of his writing. He does not merely extend the law to the County Court, but to others, and he there goes on to give a reason for it, by pointing out the greater liability of their Judges to error. As I find this opinion, therefore, adopted in all text-books, I think we are bound to uphold it as the law of the land, and certainly this case falls within the mischief contemplated by the act. Then it is said, that error would not lie on this judgment, which is a judgment of nonsuit. But there are authorities which contradict this; and if error will lie, so will a writ of false judgment. But it is further objected that a Judge directing a nonsuit, is not subject-matter for a bill of exceptions; but it appears to me that it falls within the principle of those cases in which bills of exceptions have been held to lie. It is not confined merely to errors in

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directing the jury, or to the improper reception or rejection of evidence, but it is extended to any directions of the Judge at any time in the course of the cause by which the judgment is affected; as, for instance, the refusing or improperly allowing a challenge of a jury. This and other points are such as form the subject of a bill of exceptions, for they cannot otherwise be questioned, as they do not appear on the record. The refusal of a demurrer to evidence is a case as is shewn in *Cort v. The Bishop of St. David's* (a); or the refusal to receive a party who prays to be received as vouchee. A similar case, then, is that of a direction of a nonsuit. Then, again, it is contended that, as the bill of exceptions is appended to a nonsuit, the plaintiff cannot be taken to have appeared, and cannot be heard to take the objection. But that is setting up as a defence that which is the subject of a complaint.

This bill of exceptions, therefore, I think has been properly brought before us by a writ of false judgment on the nonsuit, and the judgment of the Court below must be reversed.

VAUGHAN, J.—I am of opinion that this case comes within the mischief described by the statute, and I think the act must be liberally construed. Looking at the opinion given by Lord *Coke*, that this act applies as well to the inferior as to the superior courts; and, seeing that there is no authority the other way, I should be slow to form any opinion in opposition to it.

BOSANQUET, J.—The first question is, whether a bill of exceptions lies in a county court. Now, upon that point, the opinion of Lord *Coke* appears to have been given after much consideration, and not carelessly or loosely; and he speaks of all the Courts as being within

(a) Cro. Car. 341.

the act. He makes an observation in reference to the statute, that a particular word is put only by way of example, and nothing is more usual than that in old statutes. I cannot entertain a doubt, therefore, that a bill of exceptions lies in a county Court. But then it is contended that, although a bill of exceptions will so lie, it will not lie on a nonsuit. But if this principle were admitted, what might be the consequence? As soon as a cause was opened, the Judge might say, "I am satisfied the plaintiff has no right to go on with his action, and therefore I order the plaintiff to be nonsuited," and the plaintiff would then have no remedy. If, therefore, a bill of exceptions lies for the misconduct of a Judge, it lies for this particular species of misconduct.

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COLTMAN, J.—It appears to me also that in this case the judgment must be reversed. The authorities are all clear on the subject, with the exception of that in Buller's *Nisi Prius*. But we must look at the passage, and the nature of it, before we adopt it, and found any decision upon it. It appears to me that it refers to a Court of Quarter Session, but that is a Court in which criminal matters only are tried, in which fact and law are so mixed up, that error cannot lie. The contention that upon a record of nonsuit the plaintiff cannot be supposed to have been present to enter the bill of exceptions, is clearly answered by the maxim "Non potest adduci exceptio ejus rei cujus petitur dissolutis." The only question is, whether a venire de novo should be directed, or whether the judgment should be reversed. But from *Trevor v. Wall* (a), and *Bishop v. Kaye* (b), it appears that no venire de novo can be issued to an inferior Court.

Judgment reversed.

(a) 1 T. R. 151.

(b) 3 B. & Ald. 605.

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OWEN *v.* KNIGHT.

When, in an action of trover for a lease, it appeared that the plaintiff had delivered the indenture to a person, in order to raise money, and that he assigned it to the defendant as a security for money advanced, and which has not been paid, and the defendant pleads not guilty, and that the plaintiff was not possessed of the indenture as of his own property, the defendant may give these facts in evidence, and the plaintiff will not be entitled to recover.

BOMPAS, Serjt., and *Godson*, shewed cause against a rule for a new trial in this cause, which had been obtained on a former day by *Talfourd*, Serjt. It was an action of trover, and the declaration alleged that the plaintiff was possessed of a certain indenture, by which a certain messuage, therein described, was demised to one Feary, and complained that the defendant had converted the deed to his own use. The defendant pleaded, first, not guilty; secondly, that the plaintiff was not possessed of the indenture as of his own property; and, thirdly, a plea which alleged that Feary was, in 1833, the owner of the indenture; but that, on the 3rd August in that year, he assigned and delivered the same to the plaintiff by way of mortgage as a security for money lent to him by the plaintiff; but that, subsequently, the plaintiff re-delivered the indenture to Feary for the purpose of raising money thereon; and that Feary, with the plaintiff's consent, appearing to be the owner of the indenture, on the 23rd of May, 1836, assigned the same to the defendant as a security for the repayment of 150*l.* then advanced to Feary on the faith of the assignment; that the defendant received the indenture without any notice of the plaintiff's claim, and that the money which he had advanced was still unpaid. The plaintiff replied, joining issue upon the two first pleas, and traversing the re-delivery of the indenture by him to Feary, as in the last plea alleged. The cause was tried before *Vaughan J.*, when it appeared that the deed, having been formally demanded on the part of the plaintiff from the defendant, he had refused to give it up. The facts, as alleged in the third plea, were sworn to by Feary, who was called as a witness, and the learned Judge, in summing up, directed the jury to find for the defendant, if they believed the evidence of Feary. The verdict having been accordingly

returned for the defendant, the present rule had been obtained, on the ground that the plaintiff was entitled to a verdict on the first and second issues, although the jury should believe the facts alleged in the third plea to be established. It was now contended that the plea of not guilty put in issue the property of the plaintiff as well as the conversion by the defendant, and that the direction of the learned Judge was therefore right. The defendant, besides, was entitled to his verdict in trover. The plaintiff must not only shew property in the deed, but the right to its possession at the time of the accommodation. This right, however, could not have been said to exist, for the plaintiff had authorized its assignment as a security for money advanced, and until that money was repaid, he could have no claim to the possession of it.

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Talfourd, Serjt., in support of the rule, urged that the third plea, by admitting the assignment of the deed to the plaintiff, admitted his property in the messuage demised. Then if he was entitled to the messuage, he was entitled to the possession of the deed. *Phillips v. Robinson* (a), *Bailey v. Fermor* (b). The plea of not guilty put in issue the fact of conversion only. *Stancliffe v. Hardwick* (c), *Frankum v. Lord Falmouth* (d), established the same point. The defendant had absolutely refused to deliver the lease, and he had been guilty, therefore, of a wrongful conversion, for even his own case shewed that his right to its possession was conditional only on the payment of the money.

TINDAL, C. J.—The question of proof under the first issue is not of material importance in this case, because it appears to me that our decision must turn upon the se-

(a) 4 Bing. 106.

(b) 9 Price, 262.

(c) Ante, Vol. 3, p. 762.

(d) Ante, Vol. 4, p. 65.

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cond issue only. The issue which is joined is upon the precise proposition, that the plaintiff was possessed of the deed, as of his own property. A plaintiff can only maintain trover where he has a right to possession, as well as a legal property in the subject matter of the action, and this is clearly proved by *Gordon v. Harper* (a). There, goods leased as furniture with a house, had been wrongfully taken in execution by the sheriff, and it was held that the landlord could not maintain trover against the sheriff pending the lease, because, to maintain such an action, he must have the right of possession as well as the right of property at the time. The plaintiff here, no doubt, had a right of possession, as well as a right of property in the deed; but the instrument was afterwards delivered to the defendant with his assent to raise money. The plaintiff's position, therefore, is this, that he is entitled to the property in the deed; but his title to the possession will commence only when the money has been repaid, and the defendant, therefore, is entitled to hold possession until such repayment. The verdict on the second issue was right, and we cannot make this rule absolute.

VAUGHAN, J.—The defendant was entitled to set up his lien upon the deed, and the plaintiff, therefore, is not entitled to possession. The defendant, it is evident, does not waive his lien, because he omits to mention it. *White v. Gainer* (b), and *Boardman v. Sill* (c).

BOSANQUET, J.—I am of the same opinion, and I quite agree that the verdict on the second issue is right. The plaintiff's possession is expressly traversed, and the deed is shewn to have been deposited with the defendant, by his authority, upon the condition of the repayment of money, which has not been observed.

(a) 7 T. R. 9.

(b) 2 Bing. 23.

(c) 1 Camp. 410 (n).

COLTMAN, J.—I am of the same opinion, and I think that the right of possession is raised as a distinct issue from the right of property.

Rule discharged.

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STONE v. PHILLIPPS.

COOPER had obtained a rule nisi to set aside an award in this action, on the ground that it was not final. It appeared that there were five actions pending, having reference to the same matters, and at the last Oxford Assizes, by the consent of the parties, verdicts were taken for the plaintiffs in four of the causes, subject to the award of an arbitrator appointed to settle all matters in difference between the parties, with liberty for the other parties to come in within a month. The award directed how the verdict should be entered in the four causes, and having given certain directions with regard to the various matters in difference between the parties, ordered that all the parties to the reference should, upon being required, execute a general release of all actions touching the matters referred. The present rule had been obtained on an affidavit which stated that, independently of the four actions upon which the award had decided, there was a fifth action in ejectment for part of the premises in question, but which had not been taken to trial on account of some informality in the proceedings; this action was still pending, and was a part of the matters in difference; but although the arbitrator had notice of the action, he had omitted to dispose of it in his award.

In a submission to arbitration, four actions between distinct parties, and all matters in difference, were referred to the arbitrator; and the award omitting to decide upon a fifth action, pending between the parties, and of which the arbitrator had notice, was held bad.

Keating now shewed cause, and submitted that even although the award might be bad as to this part of it, it was good as to the remainder, and the Court would sup-

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port it. The parties to the various actions were not all the same, and as to some of them, the award could not be impeached. *Manser v. Heaver* (a) was a case in which an arbitrator, to whom a cause and all matters in difference were referred, directed a verdict to be entered for the plaintiff, and certain work to be done by the defendant; and he added, that in the event of disputes arising between the parties with regard to the performance of the work, each might bring evidence before him, with a view to a final award being made concerning the matters in difference; and he enlarged the time for making his further and final award, if requested, to six months; and it was held that the latter part of this award was bad, as it assumed to reserve a power over future differences; but that it might be rejected, and that the former part was final, and might stand. He also cited the case of *Thorp v. Cole* (b), which was to the same effect.

Cooper, contra, contended that where the matter omitted in the award was an essential part of the subject referred, the award could not be valid. He cited *Randall v. Randall* (c), *In re Robson v. Railston* (d); and the cases of *Pope v. Brett* (e), and *Turner v. Turner* (f), were decided upon the same principle. Here, the cause upon which the arbitrator had omitted to decide was one essentially within the terms of the reference, and although the causes were independent of each other, the condition of the submission must be strictly followed. It was evident, from the case of *Turner v. Turner*, that a submission of all matters in difference between several persons included all matters which they might have jointly or severally against each other.

(a) 3 B. & Ad. 295.

(b) Ante, Vol. 4, p. 457.

(c) 7 East, 81.

(d) 1 B. & Ad. 723.

(e) 2 Saund. 293.

(f) 3 Russ. 494.

TINDAL, C. J.—It appears to me that we cannot hold this award to be good. I think that the case of *Manser v. Heaver* does not apply, for the Court said that the clause as to the further and final award must be considered as having reference only to prospective differences, and that so much of it, therefore, might be rejected as surplusage. In addition to the four actions here referred, all matters in difference were left to the decision of the arbitrator. Part of the matters was an ejectment, upon which there was no award, and I cannot say, therefore, that the award is good, when the arbitrator is required to award on the premises referred to him. The case is like that of *Auriol v. Smith (a)*, which was decided in the Court of Chancery. It was held there that an award might be good in part and bad in part, where the submission was clearly capable of being separated, but not where all the matters were within the submission, and the award upon the face of it was entire.

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BOSANQUET, J., concurred.

COLTMAN, J.—There are cases where an award may be partly good and partly bad, but that is where the matter objected to is severable, as in *Doe d. Williams v. Richardson (b)*, where the defect in the award was only as to the direction for mutual releases, or *Aitcheson v. Cargey (c)*, where the arbitrator exceeded his authority by directing the mode in which the matters ordered by the award were to be done. The present case, however, does not come within this rule.

Rule absolute.

(a) 1 Tur. & Rus. 198.

(b) 8 Taunt. 697.

(c) 2 Bing. 199.

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HOCKEN v. GRENFELL.

A plaintiff is not entitled to the costs of an unsuccessful motion to set aside an award, although the improper construction which the defendant had put on the award induced the application.

THIS was an action on the case, brought against the defendant for obstructing the plaintiff in the use of a water-course, and it appeared that the right of the plaintiff was secured to him under the award of an arbitrator, and that the present action had also been referred, a condition being annexed to the order of reference that the award made should not be inconsistent with that which was already in existence. On the second award being delivered and acted upon by the defendant, a rule nisi was obtained on behalf of the plaintiff to set it aside, on the ground that the defendant had put a construction upon it inconsistent with the rights granted to the plaintiff by the first award, and that it was ambiguous, and not final. The matter was eventually turned into a special case, when the Court expressed an opinion that the construction put on the second award by the defendant was untenable, and the rule was in consequence discharged. The plaintiff applied to the Prothonotary to tax his costs upon this rule, but he declined to do so, and *Wilde*, Serjt., having obtained a rule nisi for a review of the taxation,

Crowder now shewed cause.—He contended that the case was of an ordinary nature, and that the rule having been discharged, the defendant was entitled to his costs.

Wilde, Serjt., in support of the rule, submitted that although in point of form the rule had been discharged, yet that in fact the decision was in favour of the plaintiff. The construction which the defendant had put upon the award, and which had compelled the plaintiff to apply to the Court, had been held to be incorrect. He cited *M'Andrew v. Adam* (a), where it was held that if a rule be drawn up

(a) 1 B. N. C. 270.

in the alternative, the party who fails on the substantial question is not entitled to the costs of the rule, although he succeed upon the alternative.

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TINDAL, C. J.—I think that this rule must be discharged, for it appears to me that if the Court came to any other decision, an exception would be introduced, which it would be difficult to apply to other cases. The motion of the plaintiff was to set aside the award, and although the construction which was contended for by the defendant was one which we thought could not be supported, yet the motion must take the usual course, and the costs must be costs in the cause.

Rule discharged.

JONES and Another v. TOBIN.

WILDE, Serjt., had obtained a rule nisi for a review of the taxation of costs in this cause. It was an action on the case brought against the defendant, as owner of a steam vessel, for having landed goods consigned to the plaintiffs at a wharf in London, the plaintiffs having, within a reasonable time after the arrival of the steamer, and before the goods had been landed, sent their lighter alongside the steamer, and required the defendant to deliver them into that craft, expressing their willingness to pay the freight. The defendants' pleas were, first, not guilty; secondly, that the craft of the plaintiffs had not been tendered for the receipt of the goods; thirdly, that the plaintiffs were not ready to receive the goods, and pay the freight; fourthly, that although, in the notice for the delivery, the defendant was required to deliver the goods into the plaintiffs' craft upon the tender of the bills of lading

Where, in an action on the case for refusing to deliver goods out of the defendant's ship into the plaintiff's lighter, an issue is raised upon the tender of the bills of lading and freight, the costs of witnesses in attendance at the trial, but who are not called to prove the custom with regard to such tender, will not be allowed.

The plaintiffs, being successful in the cause, are entitled to the costs of a special jury summoned on the process of the defendant, although the Judge shall not certify.

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and freight, yet that no bills of lading or freight were tendered. The defendant therefore unloaded the goods on the wharf. Issue was joined upon each of these pleas, and the cause was tried on the 3rd of July, before a special jury. It was then proved, on the part of the plaintiffs, that the defendant's vessel had arrived at her moorings in the Thames, on the 23rd of November, 1836, and that on the following morning the plaintiff's servant had delivered on board a notice for the delivery of the goods, and had tendered his craft to receive them; that he remained alongside the vessel until four o'clock in the afternoon, but received none of them; and although he was in attendance on the following morning, and waited several hours, none of the goods were delivered. It was further proved, that after the lighter had gone away on each day, a portion of the goods had been landed; that the custom was not to pay the freight on the delivery of the goods, but that the amount was usually collected by the ship's agent from the consignees, after the cargo had been delivered. It was not usual that the bills of lading should be produced unless specially applied for, but that no application had been made in the present instance. A verdict in this case was found for the plaintiffs to the amount of the charge to which they had been subjected for wharfage dues. The cause had been tried by a special jury struck by the plaintiffs under these circumstances; the defendant having obtained a summons for a month's time to plead, the plaintiffs had been put under terms for making the cause a special jury cause, and a rule for a special jury was in consequence obtained on the part of the plaintiffs. A similar rule, however, having been obtained on behalf of the defendant by his attorney, and a jury struck, the plaintiff's rule was abandoned. The jury was obtained upon the defendant's rule, but was summoned under process lodged at the instance of the plaintiffs. At the taxation of the costs, a sum of 22*l.* 17*s.* 7*d.* was claimed, but

the Prothonotary disallowed the costs of subpoenaing twelve out of seventeen witnesses, who had attended the trial for the purpose of giving evidence as to the course usually adopted upon the delivery of bills of lading and the payment of freight, as well as the costs demanded by the plaintiffs for attending upon the defendant's rule for a special jury, of the process for summoning the jury, and of the costs of the plaintiff's rule, the sum of 67*l.* 17*s.* 4*d.* being taxed off the amount of the bill. The rule had been obtained on the ground that the custom, as to the delivery of the goods, was immediately in issue at the trial, and although it was the opinion of the learned Judge that the witnesses who were in attendance need not be called to prove the usage, the plaintiffs were entitled to the costs of those witnesses, as it would not have been safe for them to go to trial without having them in attendance. The plaintiffs were also entitled to the costs of the special jury, which, although it had been summoned on the defendant's process, had been adopted by them.

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Sir *F. Pollock* now shewed cause, and contended that the Court would not interfere unless in the case of an error in principle. The question of costs upon the attendance of these witnesses, was a question of detail upon which the Prothonotary had a right to exercise a discretion, with which, the Court would not interfere. With respect to the special jury, as the learned Judge had not granted his certificate, the disallowance of the costs was correct.

Wilde, Serjt., and *Cleasby*, *contra*, submitted that, the exclusion of a whole class of witnesses, whose attendance it was necessary for the plaintiffs to procure, in order to prove an issue which was collateral to the cause, was an error of principle, with respect to which the Court would feel itself bound to interfere. It was at the defendant's own instance

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that the cause was made a special jury cause, and the plaintiffs therefore were not bound to apply to the Judge for a certificate. The plaintiffs being, as it were, tied to the stake and dragged on to trial, were entitled to make the best of it: *Holt v. Meddowcroft* (a).

TINDAL, C. J.—Before we make this rule absolute, we must be satisfied that the question of custom, that upon requiring the delivery of goods that have arrived by ship, it is necessary to tender the freight, and which the witnesses, the costs of whose attendance the Prothonotary has disallowed, were subpoenaed to prove, was put in issue by the plea. Now, the fourth plea, on which this question of custom is said to be raised, alleges that, in the notice given by the plaintiffs for the delivering of the goods over the vessel's side, they were required to be delivered into the plaintiff's craft, the bills of lading and the freight being tendered; but that neither the craft, the bills of lading, nor the freight, were actually tendered. Now, this appears to be an express issue upon the actual tender, and upon that issue the custom does not appear to come in question. I think, therefore, that the discretion of the Prothonotary has been properly exercised with regard to the costs of those witnesses. As regards the special jury, as it was not struck by the plaintiffs, no certificate was necessary, and the costs ought to have been allowed; upon that point, therefore, the rule must be absolute.

The other Judges concurred.

Rule absolute.

(a) 4 M. & S. 467.

QUEEN'S BENCH PRACTICE COURT.

May Term,

IN THE FIRST YEAR OF THE REIGN OF VICTORIA.

ELLIOTT v. GUTTERIDGE.

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WHITE moved for leave to add certain bail to those already put in, but who had been rejected on a preliminary objection taken at the time when they came up for the purpose of justifying. The present case did not come within 5 Reg. Gen. T. T. 1 Will. 4 (a). The words of that rule were, "That the bail, of whom notice shall be given, shall not be changed without leave of the Court or a Judge." That rule clearly contemplated cases in which no attempt had been made to justify the bail originally put in, and not cases where an attempt had been made to justify. He cited the case of *Rex v. The Sheriff of Essex* (b).

Where bail has been rejected on the ground of a technical objection, the Court will not allow bail to be added.

PATTESON, J.—I think this case is distinguishable from the one you cite; for, it does not appear in that case that the bail had there endeavoured to justify. If I were to grant this application, I should be letting in all the mischief, which it was the object of that rule to prevent. If the bail originally put in are substantially good, an affidavit to that effect might be made, and the bail be again brought up for the purpose of justifying. Why is that bail not brought up? Because, the defendant knows that they are insufficient. I think, therefore, that the present application cannot be granted.

Rule refused.

(a) Ante, Vol. 1, p. 103.

(b) Ante, Vol. 2, p. 782.

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Ex parte CRAGG.

A clerk, under the age of 21, cannot be examined pursuant to Reg. Gen. H. T. 6 Will. 4.

WIGHTMAN applied, on behalf of a young gentleman who had not yet attained the age of twenty-one, that he might be examined pursuant to the new rules, although he was still an infant. There was no rule of Court or act of Parliament positively directing that a person must have attained full age before he could be *admitted* as an attorney. No reason could exist why he should not be *examined*.

PATTESON, J.—I never heard of an infant attorney. He can not be admitted until he has attained the full age of twenty-one. An attorney must necessarily enter into many contracts, and then, when it is sought to enforce them, the plaintiff may be answered with a plea of infancy. The examination is preparatory to his being admitted, and therefore he must be then presumed to be of fit *age* at the time to be admitted. The proper course is for him to wait until he is twenty-one. There can be no reason for suspending the rules in favour of this applicant.

Refused.

Ex parte Wightman v. Hard. 3. 21 Q.B. 406.—

DOE d. STEVENS v. LORD.

(Before the Four Judges.)

The lessor of the plaintiff in ejectment, who was a mortgagee,

WARREN shewed cause on the last day of term against a rule obtained by *Waddington* in the Bail Court obtained judgment, and after more than a year and a day had elapsed, without reviving the judgment by sci. fa., issued a hab. fa. poss., which, after execution, was set aside by a Judge's order; but the judgment left in force. On a motion for a rule for a writ of restitution:—*Held*, that such writ could not issue; but the rule might be moulded so as to order the lessor of the plaintiff to restore possession.

Semble, per *Patteson, J.*, that a party having recovered in an ejectment, cannot, by his own act only, and without the authority of the Court, take possession.

Though the full Court will not permit a matter of law to be discussed on the last day of term, they will allow cause to be shewn against a rule praying for a writ of restitution, where it was referred to the full Court from the Bail Court, and counsel had been unable to bring it on till the last day, owing to the press of business in the Court, and the case is very urgent.

on an early day in the term, and which *Littleedale, J.*, had referred to the full Court. The rule called on the lessor of the plaintiff to shew cause why a *writ of restitution* should not issue to the sheriff of Northamptonshire, ordering him to restore possession to the defendant of the lands, tenements, and hereditaments seized by virtue of a writ of possession, which had been set aside by the order of *Williams, J.*, for irregularity, and why the costs of all such proceedings should not be paid by the lessor of the plaintiff, and why all further proceedings upon such writ of possession should not be stayed.

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PATTESON, J.—This is a point of law, and cannot be taken on the last day of term. That is a settled rule.

Warren.—If a mere matter of practice as to the form of a particular application to the Court, is *such* a point of law as the rule is aimed at, of course the case must stand over, and be put into the peremptory paper. A large amount of crops will perish in the mean time.

LORD DENMAN, C. J.—Why could you not have shewn cause on an earlier day of the term? When was the case sent here?

Warren.—Three or four days ago; since which the Court has been constantly occupied, and I had no opportunity of moving, though in daily attendance.

Waddington also urged the Court to dispose of the rule, as it was of great importance to both parties.

LORD DENMAN, (after consulting the other Judges).—We think we ought to hear you; you may proceed.

Warren.—Though eleven affidavits are sworn on the part of the defendant, they agree with the only one sworn

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by the lessor of the plaintiff, in sufficient points to raise the matter of law on which it is contended that this rule must be discharged, and with costs. This action was brought in 1833, by the mortgagee, against the heir at law of the mortgagor; was tried, and a verdict found for the plaintiff, at the Spring Assizes for Northamptonshire in 1834. Judgment was signed in Michaelmas Term, 1834, and a writ of possession, with a fi. fa. for costs incorporated, issued soon after; but owing to negotiations between the parties, out of which arose a suit in equity which was not terminated till the latter end of 1836, it was not executed. Without suing out a scire facias, the lessor of the plaintiff, in June last (1837), issued a second writ of habere facias possessionem, under which the sheriff gave possession, but which writ, on the 11th of July, was set aside by an order of *Williams, J.*, for irregularity in being issued without the judgment having been revived by sci. fa.; but the order did not direct possession to be restored. When the order was served upon the lessor of the plaintiff, he gave a written notice to the defendant, that he abandoned all right founded on the hab. fa. poss., which had been set aside, and was ready to pay the costs of it; but that, as mortgagee in possession, he had an independent right to remain, especially having a judgment of the Court in his favour then in full force. After waiting for two months, during which the lessor of the plaintiff had incurred great expense in gathering the crops, and resisting many attempts on the part of the defendant forcibly to regain possession, a summons was taken out in September to the same effect as the present rule, but upon which *Tindal, C. J.*, refused to grant an order. The present rule was then applied for. The first objection to it was—

DENMAN, C. J.—A judge's order has set aside the writ by means of which you have obtained possession, and yet

you will not give it up. You have a great deal to get over to satisfy us in your favour.

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Warren.—However that may be, it is submitted that the present rule must be discharged, since it asks for what the Court cannot grant, and, under the circumstances, ought not to grant, if it could. First, a writ of restitution can never issue so long as the judgment remains, as in this present case, in force. In 2 Lit. Prac. Reg. 577, it is laid down that “Restitution is a writ which lies where a judgment is reversed by writ of error; and the Court which reverses the judgment gives, after the reversal, a judgment for restitution; for note, a sci. fa. quare restitutionem habere non debet, reciting the reversal of the judgment, and the writ of execution, and return thereof filed, must issue forth.” This agrees with all the old authorities; and proves that this writ cannot issue while the judgment stands in full force, and further, that it must be founded on matter of record. The latter position is expressly laid down in the same authority: “There ought to be no restitution or re-restitution granted of the possession of lands where it cannot be grounded on some matter of record appearing to the Court” (a). Again: “The restitution is to be granted by the Court upon a suggestion of the insufficiency of an indictment of forcible entry or other matter, until the certiorari be returned and filed; for before the returning and filing of it, the Court hath nothing before them upon record to judge upon.” It is also said that a writ of restitution is not properly to be granted but in such case where the party cannot be restored by an ordinary way of justice or course of law; for where ordinary remedies may be had, extraordinary are not to be resorted unto; and, in a previous part of the same book, is given an instance of an ordinary remedy:—

(a) Citing Hill, 22 Car. B. R.

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“The law doth often times restore the possession to one without a writ of possession, to wit, by a writ of habere facias possessionem and other ways, in common course and proceedings of justice (a) upon a trial of law” (b).

PATTESON, J.—What is the defendant to do in such a case as this?

Warren.—Bring another ejectment, or make the judge’s order a rule of Court, and attach the lessee of the plaintiff for disobedience to it: either of these suggestions tests the fallacy of the present application. He could not bring another ejectment, for the legal estate is, by his own act, vested in the lessor of the plaintiff; he could not have an attachment, for we contend (though the validity of the order was strongly disputed before the judge), that we have obeyed the Judge’s order, inasmuch as we abandon all right which we attempted to derive from it, and consent to be treated as trespassers for what we did under it, and are ready to pay all the costs occasioned by our irregularity; but having a previous and then existing right against all the world, and especially as against the defendant, we were guilty of no contempt or disobedience in asserting that right. Suppose this rule to be made absolute, the defendant will then have to draw up his writ of restitution; and in so doing, must recite that which is positively false, that “it was considered that the judgment aforesaid, for certain errors therein assigned, should be reversed, annulled, and altogether holden for nought; and that the said defendant should be restored to all things which he had lost by occasion of the said judgment.” In Tidd’s Appendix, p. 655, 9th edit., there is given a form of a writ of restitution in ejectment in the Exchequer, which, after the same

(a) Trin. 23 Car. B. N.

(b) Ibid, 579.

recital as in a writ of hab. fa. poss., proceeds thus: "And because since the issuing of our said writ (of possession), it hath appeared to the Barons of our said Exchequer, that the said *judgment* obtained by," &c., "was irregularly obtained, and that our said writ (of possession) *thereupon* issued improvidently and unjustly," &c. How could the present defendant, then, draw up such a writ? There are no valid authorities or precedents for such an application as the present. It is true, that in Chitt. Archb. 641, 4th edit., it is stated, that under such circumstances as the present, a writ of restitution will be awarded; but the authorities there cited do not bear out such a statement. If such an application as the present could have been sustained, so many occasions for it must have occurred in practice as to give rise to reported cases on the subject. The absence of such a case is, alone, a strong argument against granting the present rule. In the late case of *Doe d. Williams v. Williams* (a), the writ of restitution was ordered, because the regular *judgments* had been set aside. Again, is it consistent with justice or reason, that the Court, having solemnly declared the right of property not to be in the defendant, but in the plaintiff, should now be asked to take away that property from the plaintiff, and give it to the defendant? The defendant has, by his solemn act and deed, exhausted himself of all right to the property in question, and conveyed it for a large sum to the plaintiff, whose right, moreover, has been sanctioned by the Court, but who are asked to declare, *uno flatu*, that the land is the plaintiff's, and yet he must give it up to the defendant.

COLERIDGE, J.—Your argument is, that the defendant has made an erroneous application to the Court, and asked for an inapplicable remedy, and it would seem clear that

(a) 2 Ad. & Ell. 381.

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he has; but why cannot we overlook the error, and so mould the rule as to give him possession?

Warren.—Certainly not. That is not what counsel came prepared to shew cause against; but against the application for a writ of restitution; and if it be shewn, that what is asked for cannot be granted, surely the rule must be discharged, or why shew cause against it? Had the rule prayed for what the Court now suggested, it might be that the lessor of the plaintiff would not have been advised to resist the application, and incur the expense of these proceedings. It would certainly appear unfair towards those who had to shew cause against definite and specific applications, if they were to be taken by surprise by the Court offering to give something else than the applicant has asked for. Such a course would open wide a door to fraud and negligence: erroneous applications may be made purposely to mislead the research of counsel; and *vigilantibus non dormientibus jura subveniunt*. In *Moore v. Archer* (a), a defendant made an error in obtaining a rule to set aside the declaration, and *Abinger*, C. B., said, "The declaration is not irregular; the motion should have been to set aside the writ; the rule must be discharged with costs." But it is equally clear that even the remedy now suggested ought not to be granted. The lessor of the plaintiff had, perhaps, been guilty of a technical error in getting into possession of what was clearly his own; but he ought not, therefore, to be compelled to abandon it to the wrongful claimant. It is laid down in the books, that if a party has judgment to recover his term, he may enter without suing out an *habere facias possessionem*; for where the land recovered is certain, the recoverer may enter at his peril, and the assistance of the sheriff is only to preserve the peace.

(a) 4 Dowl. P. C. 214.

PATTESON, J.—What authorities do you cite for that position?

Warren.—Runnington's Ejectment, 475 (Ed. 1820), and 2 Sillon's Pr., citing 2 Sider. 156.; 1 Roll Rep. 213; Noy. 71; Palm. 263.

PATTESON, J.—This goes to the foundation of the whole matter generally.

Warren.—It does certainly; and it is submitted that there is no possible ground either of substantial justice or legal principle on which the defendant can be entitled to obtain either that which he has asked for, or what it is now intimated he may have, though he has not asked for it. It may be laid down as a settled principle of law, that the unquestionable owner of land may enter, if he choose, by his own act, and take possession of it, and will be supported in doing so by his clear and undisputed right. In *Taylor v. Cole* (a), Lord *Kenyon* said—"The question is, whether a person having a right of possession may not peaceably assert it, if he do not transgress the laws of his country. I think he may; for a person who has a right of entry may enter peaceably; and being in possession, may retain it, and plead that it is his soil and freehold." The same doctrine has been clearly upheld in *Taunton v. Costar* (b), *Turner v. Meymott* (c), *Butcher v. Butcher* (d), and various other cases. Were it, indeed, otherwise, it would be an absurd anomaly in the law.

Then it will be said that the lessor of the plaintiff got into possession by means of a defective writ of possession, which has been set aside: that, however, cannot vary the case. It has been laid down by Lord *Holt*, and expressly

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(a) 3 T. R. 295.

(b) 7 T. R. 431.

(c) 1 Bing. 158.

(d) 7 B. & C. 399.

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affirmed in *Crowther v. Ramsbottom* (a), "that if one hath a legal and an illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by reason of the legal warrant, for it is not what he declares, but the authority which he has, that is his justification;" and accordingly, in that case it was held that "it was not material to inquire what the defendants said when they entered, but only whether they had in fact a legal warrant to justify them." Now, in the present case, at the time that the erroneous writ of possession was resorted to by the lessor of the plaintiff, he had "a legal warrant and authority to justify him," namely, his legal title as mortgagee, fortified by a judgment in ejectment. This doctrine was also upheld in *Oakes v. Wood* (b), and by *Littledale, J.*, in *Lucas v. Nockells* (c). The lessor of the plaintiff may have erroneously called in the sheriff's assistance, and is content to be mulcted for his irregularity, in the costs it occasioned, and which are considerable, but he was not ordered to restore possession, and the Judge was correct in not making such an order on the grounds stated. The lessor of the plaintiff's being now ordered to give back all that was absolutely his own to one whom the Court had solemnly declared to have no right whatever to it, would be a penalty vastly more than commensurate with his alleged delinquency, and would appear to be injustice. On these general grounds it was submitted that the rule must be discharged, as the defendant had no locus standi in Court, having no right either at law or in equity, and having made, at all events, an erroneous application to the Court.

Waddington, in support of the rule.—The lessor of the plaintiff was clearly wrong in issuing a writ of possession without having revived his judgment by sci. fa.;

(a) 7 T. R. 658.

(b) 2 M. & W. 791.

(c) 10 Bing. 185.

that writ being set aside, it cannot be tolerated that the lessor of the plaintiff should nevertheless be at liberty to hold out against the Judge's order, and the authority of this Court. Notwithstanding the elaborate research and argument which have been brought to bear against this application, there are two cases in which a writ of restitution issued under similar circumstances to the present. In *Goodright v. Noright* (a), a writ of restitution was ordered.

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Warren.—There the judgment had been set aside.

Waddington.—Also in *Withers v. Harris* (b), which is precisely in point with the present case. The judgment there had not been reversed, and yet a writ of restitution was awarded, because a sci. fa. to revive the judgment had not been sued out.

DENMAN, C. J.—There, probably, the objection was not taken, as it is here. It is now urged, as it might have been urged there, that though possession might be ordered to be restored, still a writ of restitution cannot be granted.

Waddington.—That may be so. At all events, he hoped that the Court, as it had intimated, though it could not grant a writ of restitution, would so mould the rule as to give substantially what was asked for.

DENMAN, C. J.—We think that though a writ of restitution cannot be granted, as prayed, yet that under the circumstances, the lessor of the plaintiff cannot be permitted to retain what he has taken into his possession; and that we have power to mould this rule so as to give restitution of what has been seized by the lessor of

(a) Barnes, 198.

(b) 2 Ld. Raym. 806.

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the plaintiff; but it will be made absolute without costs.

PATTESON, J.—I am of the same opinion; and moreover, I desire that it may not go forth that I, for one, assent to the doctrine which has been contended for, that a party having recovered in ejectment may, by his own act only, and without the authority of the process of the Court, enter upon and retain possession of the land so recovered.

COLERIDGE, J.—I also think we have power to mould this rule in the way suggested. I shall add only that the cases of *Taunton v. Costar*, and *Turner v. Meymott*, are distinguishable from the present, and do not bear out the doctrine contended for by Mr. Warren.

Rule absolute accordingly, without costs.

BLOOR v. COX.

On an application under the 7 & 8 Geo. 4, c. 71, s. 2, to take money and costs out of Court, which have been deposited in lieu of bail, if the cause is in such a state that issue may be joined before the rule is disposed of, the Court will grant it, with a stay of proceedings.

FITZJAMES applied for leave to take a certain sum of money out of Court, which had been paid in lieu of bail, together with 20*l.* for costs. He proposed to make the application according to the common law jurisdiction of the Court, and not under the 7 & 8 Geo. 4, c. 71, s. 2, because it had been decided (*a*) that under that act the application must be made before issue joined. Here, the proceedings were in such a state that issue might be joined before the present rule could be finally disposed of. The objection would then be taken, that the application had come too late.

PATTESON, J.—In order to prevent such a step you may take your rule, with a stay of proceedings.

Rule accordingly.

(*a*) See *Ferrall v. Alexander and another*, ante, Vol. 1, p. 132.

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WEATHERALL v. LONG.

J. BAYLEY shewed cause against a rule nisi obtained by *Andrews*, Serjt., calling on the plaintiff to shew cause why the warrant of attorney given by the defendant, the judgment, and execution thereon, should not be set aside, and a sum of 78*l.* in the hands of the sheriff paid over to the defendant, on the ground that the warrant was not in conformity with 1 Reg. Gen. H. T. 2 Will. 4, s. 72 (a). By that rule it was provided, that "no warrant of attorney to confess judgment or cognovit actionem, given by any person in custody of a sheriff or other officer upon mesne process, shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending at his request, to inform him of the nature of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney." It would be seen, from the language of the rule, that it applied to prisoners only in custody on "mesne" process, and not on final process. The case of *France v. Clarkson* (b), confirmed this construction. In *Lewis v. Gompertz* (c), Mr. Justice Coleridge decided, that the fact of the prisoner being in custody on mesne process must be shewn in the affidavit supporting the prisoner's application. Here it was not shewn, on the face of the affidavit, that the defendant was in custody on mesne process. It merely stated that the defendant had been "arrested and taken to a lock-up house." It was quite consistent with this statement that she was in custody on final process, for she might have been "arrested and taken to a lock-up house" on a ca. sa.

In order to entitle a defendant to the benefit of 1 Reg. Gen. H. T. 2 Will. 4, s. 72, it is not necessary that he should swear in terms that he is a prisoner in custody on mesne process, if it appears from the statements in the affidavit that his custody must be on mesne process.

A prisoner in custody at the instance of one plaintiff, is not entitled to the benefit of 1 Reg. Gen. H. T. 2 Will. 4, s. 72, in respect of a warrant of attorney given to another plaintiff while in such custody.

(a) Ante, Vol. 1, p. 192.

(b) Ante, Vol. 5, p. 699.

(c) Ante, p. 7.

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Andrews, Serjt.—The affidavit stated that after obtaining the warrant of attorney, judgment had been signed. It must therefore be presumed that the custody in which the defendant was at the time of giving the warrant of attorney, was on mesne process, and not final process.

PATTESON, J.—I think that is sufficient to shew that the defendant was in custody on mesne process at the time of giving the warrant of attorney.

J. Bayley then produced an affidavit, from which it appeared that the defendant had been arrested at the instance of a plaintiff named Briggs Russt, and taken to a lock-up house. While there, she sent for the plaintiff in the present action, to whom she was indebted, and in order to secure his debt, gave him the warrant of attorney in question. The present case could not therefore be considered as within the rule, which only applied to cases of cognovits and warrants of attorney given to plaintiffs, at whose instance the defendants were in custody. The object of the rule was to protect persons, when in custody at the instance of their creditor, from the influence which might be exerted upon them while so in custody, in order to induce them to give the instruments mentioned in the rule for a greater amount than was due, they not having the benefit of an attorney's advice. The present case, however, did not come within the mischief intended to be remedied by that rule. The defendant was not in custody at the instance of the present plaintiff, but at the instance of another person, and therefore could not be under the improper influence of her creditor in giving the warrant of attorney. He cited *Smith v. Burlton* (a).

Andrews, Serjt., contended that the words of the rule were general, and therefore would apply to this as well as

(a) 1 East, 241.

any other case in which the defendant was in custody on mesne process at the time of executing the cognovit.

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Cur. adv. vult.

PATTESON, J.—This was an application to set aside a warrant of attorney, and the motion was made on two grounds. One was, that no attorney was present when the warrant of attorney was signed. I think that that objection cannot be supported, as it appears that the defendant was not in custody at the time at the suit of Wetherall, but of another person, Briggs. The rule of H. T. 2 Will. 4, was relied on as sufficiently comprehensive in its terms to include the case where the party was in custody at the suit of any person. Now, it must be recollected, that that rule was not a new rule, and was not made for the purpose of establishing any new practice, but was for the purpose of assimilating the practice of all the Courts. It was an old rule in one Court, and had been formerly in the very same words, and it has, moreover, already received the construction of the Court. The case of *Smith v. Burlton* is a case directly in point; there the rule was considered, and the Court expressed their regret that they were compelled to come to that decision. If they could not help pronouncing that decision, I do not see how I can arrive at a different one.

Rule discharged, with costs.

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Judgment cannot be signed against the casual ejector, in respect of a service on the daughter carrying on the business of the tenant in possession, who is a lunatic, and confined away from the premises.

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FRANCILLON moved for judgment against the casual ejector. The service had been effected on the daughter of the tenant in possession, at the premises on which the business of the latter was carried on by her. The tenant himself was a lunatic, and confined in a lunatic asylum.

PATTESON, J.—I do not think that is a sufficient service; it might have been effected on the lunatic himself. Here, however, the application is made in respect of a service on the daughter. That is an insufficient service.

Rule refused.

DOE *d.* CROONE *v.* ROE.

In a country ejectment, if the notice is to appear in one term, judgment may be obtained against the casual ejector in the next term, without a rule nisi in the first instance.

MARTIN moved for judgment against the casual ejector. The peculiarity in the case was, that the notice required the tenant to appear in the last term. It was a country cause, and some doubt existed as to whether a rule nisi in the first instance should not be obtained.

PATTESON, J. (after consulting Mr. Hill, the Clerk of the Rules.)—That is sufficient to entitle you to sign judgment without a rule nisi, as it is a country cause.

Rule granted.

1838.

ROBINSON v. ROLAND.

WORDSWORTH shewed cause against a rule nisi obtained by *Humfrey* for setting aside a nonsuit, on the ground of misdirection on the part of the under-sheriff of Sussex, before whom the cause had been tried. It was an action for an attorney's bill, and the defendant pleaded *nunquam indebitatus*. At the trial, the plaintiff was about to prove his demand, when it was objected, that the plaintiff had not proved the delivery of a signed bill a month previous to action brought, as required by 2 Geo. 2, c. 23; 2ndly, that it was consequently necessary for the plaintiff to prove when the action was commenced, for that fact did not sufficiently appear from the writ of trial. In answer, it was contended that the objection of the non-delivery of a signed bill was only available by special plea. The under-sheriff was of a different opinion, and nonsuited the plaintiff. *Wordsworth* now submitted that the direction of the under-sheriff was right. He cited *Morgan v. Ruddock* (a), where it was held, that, in an action for an apothecary's bill, the objection that the plaintiff was not in practice as an apothecary prior to or on the 5th of August, 1815, or had not obtained a certificate from the Society of Apothecaries, need not be pleaded, but may be rendered available under the plea of non-assumpsit. That decision proceeded on the peculiar language of the 55 Geo. 3, c. 194, s. 21, which was, "that no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to or on the said 5th day of August, 1815, or that he has obtained a certificate to practice as an apothecary from the said Master, Wardens, and Society of Apothecaries as aforesaid." There, Mr. Justice *Pat-*

The defence of non-delivery of a signed bill, in an action for an attorney's bill, must be pleaded specially, and is not available under *nunquam indebitatus*.

The word "impleaded" in a writ of trial means that the action was commenced.

(a) Ante, Vol. 4, p. 311.

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teson held, that, notwithstanding the words of the pleading rule 3 (a), under the head of assumpsit, the plaintiff was bound to prove his practice or his certificate, as a condition precedent to his recovering the debt, whatever plea the defendant might have put upon the record (b). The question, therefore, was, whether the language of the 2 Geo. 2, c. 23, s. 23, was not equally binding on an attorney who sought to recover the amount of his bill. The words of that section were, that no attorney “shall commence or maintain any action or suit, for the recovery of any fees, charges, or disbursements, at law or in equity, until the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their dwelling-house or last place of abode, a bill of such fees, charges, and disbursements.” Here, the statute prohibited the attorney from commencing his action until the delivery of the bill; and surely that prohibition must be considered as strong as the one contained in the 55 Geo. 3, c. 194, s. 21. Supposing it to be necessary for the plaintiff to prove the delivery of the bill a month before action brought, it was of course requisite that he should shew at what time the action was commenced. Of this, it was submitted, no sufficient proof was given, as it was sought to shew the commencement of the action by reference to the commencement of the writ of trial. The form of the writ was (c), that, on a certain day, the plaintiff “impleaded” the defendant. That was not sufficient to prove when the action was commenced, because it was quite consistent with the recital in the writ of trial, that the writ of summons had been issued on a former day. Under these circumstances, it was contended that the present rule ought to be discharged.

(a) Ante, Vol. 2, p. 233.

(b) See *Shearwood v. Hay*, 5 Ad. & El. 383, which is confirm-

atory of *Morgan v. Ruddock*.

(c) Ante, Vol. 2, p. 330.

Humfrey, in support of the rule, cited *Lane v. Glenny* (a), in which it was held, that the defence to an action of assumpsit on an attorney's bill, of no proper bill, duly signed, having been delivered, must be pleaded specially.

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PATTESON, J.—The present case is perfectly distinguishable from that of *Morgan v. Ruddock*. My decision in that case proceeded on the peculiar language of the Apothecaries' Act. It seemed to me that the necessity of proof by the plaintiff in such a case was imposed on the plaintiff by way of penalty, and therefore that no omission on the part of the defendant to plead the statute would relieve the plaintiff from the necessity of giving that proof. In my opinion, if the defendant had suffered judgment by default, the plaintiff would have been equally bound to prove it on the execution of a writ of inquiry. The language of the Attorneys' Act is totally different. The words are "commence" or "maintain," leaving it quite at large how advantage shall be taken of the objection. I am aware that my opinion on the Apothecaries' Act is different from that entertained by other Judges. That opinion, however, will not apply to the Attorneys' Act. I think the defence here sought to be set up ought to have been pleaded, and was not available under the plea of *nunquam indebitatus*. Then, as to the objection that sufficient proof of the commencement of the action was not furnished by the recital in the writ of trial, I think that the word "impleaded" means that the action was commenced on the day on which the defendant was stated to have been impleaded. The present rule must, therefore, be made absolute.

Rule absolute.

(a) 2 N. & P. 256.

1838.

SANDYS *v.* HOHLER.

In order to obtain a rule for security for costs, on the ground of the plaintiff residing out of the jurisdiction, it must be positively sworn that he is so resident, and "belief" to that effect is insufficient.

DENMAN WHATLEY moved for a rule to shew cause why the plaintiff in this case should not give security for costs. The affidavit on which he moved stated that the plaintiff was a beneficed clergyman, and it was "believed" was now resident abroad. It was also sworn, that applications had been made to the attorney for the plaintiff on the record, and he had refused to state where his client resided, but asserted that he was in this country. The ordinary affidavit, therefore, could not be made, that the defendant was actually abroad.

PATTESON, J.—It would be useless to have the rule on the affidavit which is now made, because, if the attorney swears that the plaintiff is resident in England, that will be an answer to the application.

Denman Whatley submitted, that such an affidavit would not be an answer to the application, as, in *Oliva v. Johnson (a)*, where a plaintiff carried on business abroad, and had no permanent residence in England, but was in England at the time of bringing the action, and it was sworn that he had no intention of leaving the country, the Court held that this was no sufficient answer to an application for security for costs, inasmuch as it was not distinctly sworn that he resided and intended to continue to reside here.

PATTESON, J.—That must be considered as the case of a foreigner, and I do not think the present case comes within the rule applicable to foreigners. You may, however, take a rule calling on the attorney to state the residence of his client.

Rule accordingly.

(a) 5 B. & Ald. 908.

1838.

LAYTON v. MASON.

WARREN moved for leave to stick up notice of declaration in the Master's Office, on grounds disclosed in the affidavit supporting the application.

PATTESON, J., was opinion that the grounds were sufficient.

Warren expressed some doubt as to whether he could have his rule in the terms stated in his instructions. They required, that "all future notices and rules should be served in the same way." The case of *Martin v. Colvill* (a), in the Exchequer, decided that the Court would not grant a prospective rule of that description, but would leave the plaintiff to come on future occasions to the Court if it should be found necessary.

PATTESON, J.—As far as the notice of declaration is concerned, the affidavit is sufficient; but I think you cannot have your rule as to the future notices and rules.

Rule accordingly.

(a) Ante, Vol. 2, p. 694.

TORY v. STEVENS.

PEACOCK shewed cause against a rule nisi obtained by *James*, for setting aside the declaration in this case, for irregularity. The alleged irregularity was, that although the defendant had been arrested on a writ of *capias*, the de-

Where the Court allows notice of declaration to be stuck up in the Master's Office, they will not, in the same rule, direct the service of all future notices and rules to be made in the same way.

A variance between a declaration and the process is an irregularity, in respect of which an application should be made

in vacation promptly to a Judge at chambers.

If such an application be made, and the Judge refuse to interfere, pleading a plea under protest during vacation is not such a waiver as will prevent the defendant from appealing to the Court.

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claration stated him to have been summoned. The declaration was delivered on the 10th of August, and by the operation of the provisions of 12 Reg. Gen. M. T. 3 Will. 4 (a), the time for pleading did not expire till the 1st of November. On the 2nd of that month, before the opening of the judgment office, a plea was delivered under a protest. The presumed object of the protest was, to reserve to the defendant the right to apply, on the ground of the alleged variance between the declaration and writ. This, however, it was submitted, could not have the effect of curing the defendant's own laches. It was clear the defendant had been guilty of laches in not applying by summons during vacation, as soon as he was aware of the irregularity existing. He had no right to wait until the following term before he took advantage of the supposed irregularity. He cited *Cox v. Tullock* (b), the marginal note of which was, "where there is an irregularity in any proceeding had in vacation, and there is time in the course of that vacation to apply to a judge at chambers, it is imperative on the party complaining to do so; and he cannot wait to move to set aside the proceeding till the first four days of next term, though there has been no intermediate step taken." Suppose the plea in this case had been delivered immediately after Trinity Term, as in the present instance, under a protest. The defendant then could not apply to the Court until the following Michaelmas Term, for the purpose of giving effect to his protest. In the meantime the plaintiff might have proceeded, according to the provisions of the uniformity of process act, to trial, and possibly, pursuant to the 1 Will. 4, c. 7, s. 2, have obtained speedy execution. Would it be said, that under such circumstances, the defendant could be allowed to come in Michaelmas Term, and set aside the whole of the plaintiff's proceedings on the ground of the supposed irregu-

(a) Ante, Vol. 1, p. 473.

(b) Ante, Vol. 2, p. 47.

larity, which depended on the alleged variance? In the case of *Anderdon v. Alexander* (a), the marginal note was, "Where a defendant moved to set aside proceedings to outlawry for irregularity, the last of the proclamations being in August, and the motion being made at the commencement of Michaelmas Term: held too late, it not appearing that the defendant was not apprised of the first commencement of the proceedings, but, on the contrary, there being reason to believe that he was; the onus lying on the defendant to shew that he was ignorant of the proceedings." Delivering the plea with a protest, therefore, would be of no avail.

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LITTLEDALE, J.—He might have delivered a plea under a protest, in order to avoid judgment being signed.

Peacock.—The principle must be the same, whether he delivered his plea immediately after Trinity Term, or subsequent to the 24th of October. The case of *Hinton v. Stevens* (b), was directly in point. There it was held, that an objection to a notice of declaration, on the ground of variance from the writ, must be taken within four days from the time of serving the notice, whether in term or vacation; and some of the days falling within term, and some in vacation, is immaterial. Under these circumstances, it was submitted, that the present rule ought to be discharged.

James, in support of the rule, contended, that as the plea had been delivered with a protest, it could not be considered as a waiver of the irregularity. The protest must be considered as reserving the right of the party to avail himself of the irregularity, and was, therefore, quite different from an act which the courts had been in the

(a) Ante, Vol. 2, p. 267.

(b) Ante, Vol. 4, p. 283.

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habit of considering as a waiver. Where an act done by a party could be considered as spontaneous, then, if it was done after a knowledge of the irregularity, the courts held that to amount to a waiver of the irregularity. Where, however, the act was not spontaneous, but the party was forced to do it, the courts were not in the habit of holding such an act to amount to a waiver. Here, it was evident that the plea of the defendant was not spontaneous, because he was compelled to plead, in order to prevent judgment from being signed. It was, however, shewn by the affidavits, that an application had been made to Baron *Gurney* to set aside the bail-bond, on the ground of this irregularity. That application had been refused. This was immediately after the delivery of the declaration. His Lordship refused to interfere, and therefore the present rule had been obtained, by way of appeal from a single judge, to the full Court. For these reasons, it was submitted, that the defendant had not been guilty of laches, and consequently, that the present rule ought to be made absolute.

Cur. adv. vult.

LITTLEDALE, J.—This was an application to set aside a declaration for irregularity; the irregularity being, that it was alleged the defendant had been summoned instead of arrested. That was the ground of the application, and I have no doubt that the declaration is irregular. I find that soon after the declaration was delivered, application was made to Baron *Gurney*. The application then was, that the bail-bond should be delivered up to be cancelled, but no application was made to set aside the declaration for the irregularity. Baron *Gurney* dismissed the application, and if that had been followed up by a summons to set aside the declaration, and that had been refused, the defendant would have been in time in his appeal to the Court. For although it is necessary that a

party should apply promptly, and before a step is taken in the cause, and here on the 23rd of October a summons for particulars of demand was obtained, and the time for pleading expired, and a plea was delivered under a protest, yet all that, I think, would not preclude the defendant from appealing to the Court. If he makes his appeal to the Court to see what they will say, still I think he is bound to plead, and as he cannot know what to plead without having a particular of demand, therefore he would not be precluded by obtaining that, or by pleading the plea under a protest. But though all that would be the case, if an application had been made to a Judge at chambers by the defendant, to set aside the declaration for irregularity, yet here, the application was by the bail for the bail-bond to be delivered up to be cancelled. I think that was an application which a judge could not entertain; but that has nothing to do with this application: the defendant should have followed up that application by taking out a summons to set aside the declaration for the irregularity, and then, if it had been refused, should have made his appeal to the Court, and not having done so, I think this application is too late, and the rule must therefore be discharged.

Rule discharged.

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RALPH *v.* JACOBS.

THOMAS moved for leave to bring up a prisoner under the compulsory clauses of the Lords' Act, 32 Geo. 2, c. 28, s. 16. A difficulty arose in the case with respect to the notice which was required to be given to the prisoner. The words of the section were, "that such creditor is hereby authorized to require such prisoner (on giving twenty days' notice in writing to him, that such creditor designs to compel such prisoner to give into the Court,

In order to bring up a defendant under the compulsory clauses of the Lords' Act, the twenty days' notice must have expired before the first day of the term in which it is sought to bring him up.

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within the first seven days of the term, which shall next ensue, the expiration of the said twenty days." Here the notice had been given only nineteen days before the term; the question was, whether the twenty days mentioned in this act were to be reckoned entirely exclusive of the term, or were to be reckoned up to the time of the defendant's appearance in Court within the first seven days of the term.

PATTESON, J.—The case of *Buxton v. Squires (a)*, is a direct authority against this application. There it was held that if the twenty days' notice to a prisoner under the Lords' Act expire on the first day of a term, he cannot be compelled to appear until the next term. Here, the twenty days had not expired before the first day of term, and therefore this application is too early.

Rule refused.

(a) Ante, Vol. 4, p. 365.

CROSS v. MARSH.

Where a plaintiff has arrested a defendant, declared, signed judgment, and charged him in execution, it is too late to make an objection to any alleged irregularity in the mode of arrest.

ARCHBOLD moved to discharge the defendant out of custody as to this action. The defendant had been arrested in the month of October, 1833, and taken to the office of the plaintiff's attorney. She then gave certain title deeds into the hands of the attorney as a security for the debt. She was then set at liberty, but in the month of December following, she was retaken on the same writ of capias. She was then informed by the sheriff's officer that the deeds were of no use, and that she must return into custody. In obedience to this suggestion she went to prison, and about two years ago was removed into the King's Bench prison. The plaintiff subsequently declared

against her, obtained judgment by default, and charged her in execution. The object of the present application was that she might be discharged, as the second arrest was a mere nullity.

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PATTESON, J.—It appears that she returned voluntarily into custody. I think, however, that the application is too late. A declaration has been delivered, judgment has been signed, and she has been charged in execution, and therefore I cannot now enter into the question as to the regularity or the irregularity of the mesne process on which the arrest has been effected. As far as the arrest is concerned, I think there is no ground for the application. With respect to the deeds, however, according to your statement, there appears to have been something like bad faith. You may therefore take a rule calling on the attorney to shew cause why he should not deliver them up.

Rule accordingly.

REGINA v. CHANEY.

BUSBY applied to discharge the defendant out of custody, on account of several defects in the commitment, on which the defendant was kept a prisoner in the gaol at Springfield, in Essex. The defendant had been brought before the Court on a writ of habeas corpus, and it appeared that the only cause of his detention was a commitment in pursuance of an alleged conviction under the 6 Geo. 4, c. 125, s. 70 (the Pilot Act). The commitment was in the following terms :—

A commitment under the 6 Geo. 4, c. 125, s. 70, (the Pilot Act), is defective, if it does not allege the offer by a licensed pilot to have been made to the defendant, or in his presence; stating the offer in the

words of the act is insufficient.

The writ of habeas corpus is not taken away by that act, and therefore the defendant is entitled to avail himself of defects on the face of the commitment.

The writ of certiorari is taken away by that act, and therefore, unless the Crown remove the conviction, the Court will consider the commitment, although defective, as a true recital of the conviction.

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“ Borough of Maldon, to wit. } To the Constables of the Borough of Maldon, and to the Keeper of the House of Correction at Springfield, in the County of Essex.

“ Whereas John Chaney, of Heybridge, in the county of Essex, porter, is convicted before (me) John Payne, Esq., one of her Majesty’s justices of the peace in and for the said borough of Maldon, upon the oath of Abraham Handley, of Maldon aforesaid, pilot, for that he the said John Chaney, did, on the second day of September, in the year of our Lord one thousand eight hundred and thirty-seven, at a certain place called Standsgate, in the river Blackwater, and within the liberties and jurisdiction of the said borough of Maldon, unlawfully continue in the charge and conduct of a certain ship or vessel called the Shipwright, of Maldon, without being a duly licensed pilot, after Abraham Handley, a pilot duly licensed and qualified to act in the premises, had offered to take charge of such ship or vessel, contrary to an act passed in the sixth year of the reign of King George the Fourth, intituled, “ An act for the amendment of the law relating to pilots and pilotage; and also for the better preservation of floating lights, buoys, and beacons;” and therefore adjudged the said John Chaney, for his said offence, to have forfeited the sum of twenty pounds: And whereas the said John Chaney being so convicted as aforesaid, and being required to pay the said sum, hath not paid the same, or any part thereof, but therein hath made default; and it appearing to me that the said John Payne, as well by the confession of the said John Chaney, as otherwise, that the said John Chaney has not sufficient goods or chattels whereupon the same may be levied, these are therefore to command you, the said serjeant-at-mace of the said borough of Maldon, to take the said John Chaney, and him safely to convey to the house of correction at Springfield, in the county of Essex, and there to deliver

him to the said keeper thereof, together with this precept; and I do hereby command you the said keeper of the said house of correction, there to imprison him for the space of six calendar months, unless the said sum shall be sooner paid; and for so doing, this shall be your sufficient warrant."

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The words of the section (70) on which the conviction authorizing the commitment proceeded were these:—
"That it shall be lawful for any licensed pilot within the limits of his license, and the extent of his qualification therein expressed, to supersede in the charge of any ship or vessel, any person not licensed to act as pilot, or not licensed so to act within such limits, or acting beyond the extent of his qualification; and every person assuming, or continuing in the charge or conduct of any ship or vessel, without being a duly licensed pilot, or without being duly licensed to act as a pilot within the limits in which such ship or vessel shall actually be, or beyond the extent of his qualification, as expressed in his license, after any pilot, duly licensed and qualified to act in the premises, shall have offered to take charge of such ship or vessel, shall forfeit for every such offence a sum not exceeding fifty pounds, nor less than twenty pounds." Then, for the recovery of the penalties mentioned in the act, it was provided by section 76, "That all fines, penalties, or forfeitures, hereinbefore, or hereinafter imposed by this act, or by any of the bye-laws, rules, orders, regulations, or ordinances hereby directed to remain in force, or hereafter to be made under the authority of this act, which shall exceed the sum of twenty pounds (the manner of levying whereof shall not, by this act, be otherwise expressly provided for), and likewise all fines, penalties, or forfeitures, imposed as aforesaid (the manner of levying which shall not by this act be otherwise expressly provided for), in cases where the lowest penalty re-

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coverable not being greater than twenty pounds, and the largest penalty recoverable being greater than twenty pounds, the party prosecuting shall proceed in respect thereof, for a sum greater than twenty pounds, with the written consent of the Corporation of Trinity House of Deptford, Stroud, or of the said Lord Warden or his lieutenant for the time being respectively (as the case may be), shall and may be recovered with full costs of suit, by action of debt, bill, plaint, or information, in any of his Majesty's Courts of Record at Westminster, to be commenced within twelve calendar months next after such offence or offences shall be committed, or within such other time as is hereinafter in that behalf directed." Then, by section 77, it was enacted, " That all fines, penalties, or forfeitures, hereinbefore, or hereinafter imposed by this act, or by any of the bye-laws, rules, orders, regulations, or ordinances, hereby directed to remain in force, or hereafter to be made under the authority of this act, and which shall not exceed twenty pounds (the manner of levying whereof shall not by this act be otherwise expressly provided for), and likewise all fines, penalties, or forfeitures, imposed as aforesaid (the manner of levying which shall not by this act be otherwise expressly provided for), in cases where the lowest penalty recoverable not being greater than twenty pounds, and the largest penalty recoverable being greater than twenty pounds, the party prosecuting shall proceed in respect thereof, for any sum not exceeding twenty pounds, with such written consent as aforesaid, shall and may be levied and recovered within six calendar months after the offence or offences committed, or within such other times as is hereinafter in that behalf directed, before any justice or justices of the peace for the county, city, division, or place, where the offence or offences shall be committed; or if committed by any pilot, then before any

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justice or justices of the peace for the county, city, division, or place aforesaid, or before any justice or justices of the peace, or any magistrate or magistrates of the city, town, or port, to which such pilot shall belong; or if committed by any owner or master of any ship or vessel, before any justice or justices of the peace for the county, city, division, or place, where the offence or offences shall have been committed, or before any justice or justices of the peace, or any magistrate or magistrates of the county, city, town, or port, at which such owner or master shall reside, or to which the ship of such owner or master shall belong." Then a particular form of conviction in the latter case was given in section 81, and that section further provided that "no certiorari, or other writ or process for the removal of any such conviction, or any proceedings thereon, into any of His Majesty's Courts of Record at Westminster, shall be allowed or granted." By section 82, a right of appeal to the Quarter Sessions was given. The time of appealing, limited by that section, had gone by.

Two objections were apparent on the face of the warrant. First, it did not appear, that the offer on the part of Abraham Handley, to take charge of the vessel, had been made to or in the presence of the defendant Chaney. It was true, that the act of parliament did not direct that the offer should be made to the defendant, or in his presence; but it was clear that no offence could be committed, if the offer had not been so made. *Peake v. Carrington (a)*, was a qui tam action on the then existing pilot act, the 52 Geo. 3, c. 39, s. 34. The language of that section of that act was the same as the language of the present act. The declaration, in that case, did not allege any offer to have been made to the master, or in his presence. On motion in arrest of judgment, the Court of Common Pleas was of opinion that such allegations were necessary, and

(a) 2 B. & B. 399.

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that it was insufficient merely to follow the words of the act of parliament.

PATTESON, J.—I presume it is admitted that it must have been so charged in the original proceeding against the defendant, as well as in the conviction. Am I not to presume that there is a good conviction in this case? If this were a motion founded on the conviction, the case cited would be analogous. Does the fact of the certiorari being taken away make it more necessary to conclude that the commitment coincides with the conviction?

Busby.—As the power to remove the conviction is taken away, the intendment will not be against the prisoner. It will be intended that the warrant follows the conviction, as it is intended in civil cases that the writ of execution follows the judgment. In favour of the liberty of the subject, the Court will not intend that there was a good conviction where the commitment is bad. The present proceeding is by writ of habeas corpus, and the cause assigned for the prisoner's detention is the present commitment. The Court, therefore, cannot look beyond the commitment. That being bad, and that being the only ground for detaining the prisoner, he is entitled to his discharge: *Wickes v. Clutterbuck* (a). The second objection is, that although by sect. 77, referring to sect. 76 of the act, consent in writing of the Corporation of Trinity House, Deptford, Stroud, or of the said Lord Warden or of his lieutenant, is required in order to give justices jurisdiction, no such consent is set forth or stated in the commitment. On the face, therefore, of this instrument, it appears that the defendant had been committed to custody by persons who had no authority to do so. He also cited the case of *Elmy and Sawyer* (b).

(a) 2 Bing. 483.

(b) 1 Ad. & El. 843.

Platt and *Montagu Smith*, in support of the commitment contended, that as the language of the act of Parliament had been followed in the commitment, it was sufficiently certain to justify the defendant's detention. It set forth the corpus delicti, and the case of *Rex v. Marks* (a) was an authority to shew that to be sufficient. The Court would, in this case, intend that there was a good conviction, and it would be presumed that the justices had heard all the evidence necessary to authorize them in convicting the defendant. In sect. 81 of the act, a form of conviction was given, and nothing was there introduced either about the person to whom the offer was made, or the consent of the Trinity House. It must, therefore, be presumed that all preliminary steps had been taken necessary to give jurisdiction to the justices, and all sufficient evidence produced in order to justify the conviction. The party, in case of the justices having proceeded improperly, was not without remedy, because, by sect. 82, he had a right of appeal to the Quarter Sessions. The same certainty which might be required in a declaration, was not necessary in this case. In *Rex v. John Taylor* (b), it was decided, that if a warrant of commitment in execution, manifestly defective on the face of it, shews that there has been a conviction, the Court will not notice the defect until the conviction is returned into court. In that case, Mr. Justice *Bayley* observed, in reference to the case of *Rex v. Hawkins* (c), that "if there is a conviction independently of the commitment, the Court will not discharge on any defect in the warrant of commitment, unless the conviction is before them." There, C. J. *Abbott* observed, "That is very reasonable; for, otherwise, there must be as much certainty and length in the commitment as in the conviction, which would be productive of great inconvenience. We must suppose, until the contrary is

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(a) 3 East, 157.

(b) 7 D. & R. 622.

(c) Fortescue, 272.

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shewn, that there is a legal conviction to support the commitment." Then, with respect to the offer having been brought to the knowledge of the defendant, the case of *Rex v. Marsh* (a) was in point. That was an information under the 5th Anne, c. 14, s. 2, against a carrier between Norwich and London for having game in his possession as a carrier; and the Court of King's Bench there held, that the information was good, without alleging that he had the game in his possession "knowingly." The words of the act of Parliament in that case were, "if the carrier have any pheasant in his possession, he shall be convicted." For these reasons, it was submitted, that the commitment was sufficient.

Busby, in reply, contended that sections 81 & 82 did not deprive the defendant of his common law right to sue out his writ of habeas corpus. That writ raised the question as to the authority under which he was restrained of his liberty. The only authority produced was a commitment, which, on the face of it, was bad. Consequently, no legal authority existed for detaining the defendant. The writ of certiorari had been taken away, and therefore the defendant could not bring the conviction before the Court. The commitment could only proceed on the ground of an existing conviction, and must be presumed to follow that conviction. If it did follow the conviction, it followed a bad conviction, and therefore the defendant ought not to be detained. The defendant, therefore, was entitled to his discharge.

Cur. adv. vult.

PATTESON, J.—I have considered this case attentively, and have looked at the case of *Rex v. Taylor*, and, without at all meaning to say that what is there decided

(a) 2 B. & C. 717.

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is not good law, yet it is not an authority binding upon me, because the Court merely said there that they would not look at defects in a commitment until they had before them the conviction itself; and when it was brought before them, it appeared to be as defective as the commitment, and therefore the defendants were discharged. It is not, therefore, an authority to shew that a party cannot be discharged on the ground of an error in the commitment. The case of *Wickes v. Clutterbuck*, was a commitment for fishing in a pond, the commitment not stating it to be an "enclosed" pond. If the pond were not enclosed, fishing in it would only amount to a trespass, and would not be within the prohibition of the 5 Geo. 3, c. 14. The Court there do not seem to regard whether the conviction was right or wrong. They said this commitment either pursues the conviction or it does not. If it follows the conviction the conviction is defective; if it does not, then there is no conviction to warrant it, and accordingly decided that an action would lie against the magistrate who issued it. The case of *In the Matter of Elmy and Sawyer*, does not appear to me to be in point, as that case turned on the question whether the second warrant was a regular warrant issued by the Justice. There, the Court thought that, as the first warrant had been withdrawn, and the second did not clearly shew that the Justices intended to commit regularly for the same offence as that for which they had before committed irregularly, there was no lawful authority for detaining the defendant. That case depended on its particular circumstances, and therefore is not in point.

Here, the certiorari is taken away, and therefore it is not in the power of the defendant to bring before the Court the conviction itself; but it was in the power of the prosecutor so to do. It is true that, on the part of the crown, it was offered in the course of the argument to produce the conviction; but I cannot look at it, because it

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ought to be brought here regularly by writ. The certiorari is not taken away from the crown, and therefore it might have been brought before me, and I might have looked at it. I feel that as the writ of certiorari is taken away, and an appeal is given to the Sessions, and there is no appeal made, there is a difficulty in saying that the conviction can be a bad one. But the greater difficulty is to see how I can possibly say, looking only at this commitment, and I can only look at it, that the conviction is good. The warrant must be taken as setting out all matters as they are recited in the conviction. The conviction, as here recited, is bad. The warrant of commitment founded upon it must be considered as bad also. I do not enter into the question with respect to the want of consent by the Trinity House to the proceedings of the magistrates; though I am inclined to think that it is a valid objection, though not so clear a one as the other. That other objection is, that the commitment does not shew the offer to have been made to the defendant, or in his presence. In the case of *Peake v. Carrington* this was held to be a fatal objection, even after verdict, in an action for penalties, under the former pilot act, the language of which was the same as that of the present act. The Court did not hold that as a mere matter of form, but as a matter of substance, and treated the averment in the declaration as a statement of a defective cause of action, and not as a defective statement of the cause of action. I must, then, treat the omission here of the allegation mentioned as a substantial defect in the conviction, for the commitment must be considered as a recital of the conviction. The defendant therefore, is entitled to his discharge.

Rule absolute.

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ROWBOTTOM v. RALPHS.

PETERSDORFF applied for leave to revive a rule which had been obtained last Michaelmas Term, and had been drawn up to shew cause on the last day but one of that term. The defendant lived at a considerable distance from town, and it was, consequently, impossible to serve him until after the day on which cause ought to be shewn. The object of the present application was to revive that rule.

Where a defendant resides such a distance from town that he cannot be served before the day for shewing cause, and the term expires on the day after that day, the rule may be revived in the next term.

PATTESON, J.—The only question is, whether you should revive the rule already obtained, or obtain a new one.

Petersdorff.—The effect of obtaining a new rule would be, that we should lose the benefit of the service and demand which have already been effected and made. The object of the party is to obtain an attachment for non-payment of money.

PATTESON, J.—You may revive the rule.

Rule revived.

DOE d. CLOTHIER v. ROE.

MOODY moved for judgment against the casual ejector. The premises were in possession of two joint tenants. Service had been effected on one of them, as the other could not be found.

Service on one of several joint tenants is sufficient against all.

PATTESON, J.—That is sufficient. Service on one of several joint tenants is sufficient.

Rule granted.

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ROBINSON v. WHITEHEAD.

A defendant will be entitled to his costs under the 43 Geo. 3, c. 46, s. 3, if he has been arrested for a larger sum than that found to be due, when the plaintiff ought to have known that he had not legal proof in support of his claim to the extent for which the arrest took place.

V. LEE shewed cause against a rule nisi obtained by *Lumley*, calling on the plaintiff to shew cause why the defendant should not be allowed his costs under the 43 Geo. 3, c. 46, s. 3, on the ground of the defendant having been arrested and held to bail for the sum of 91*l.* without reasonable or probable cause. The jury found a verdict in favour of the plaintiff for the whole sum mentioned in the declaration, subject to a reference. The arbitrator awarded the sum of 43*l.* in favour of the plaintiff. The action was partly for wages and partly for the repairs of certain clothes and tools. With respect to the latter branch of the claim, the plaintiff was unable to give evidence in support of it, as it was alleged to be in pursuance of a contract between the plaintiff and the defendant, made when no other person was present. In consequence of this defect in proof, the amount to which the arbitrator considered the plaintiff entitled was so small as 43*l.* It was, however, sworn now, that such an agreement did exist, and that the sum in question was really due. It was contended, that as the plaintiff knew the defendant to be indebted to him in the amount for which the arrest had taken place, it could not be said that it had been effected without reasonable or probable cause.

Lumley, in support of the rule, contended, on the authority of *Tipton v. Gardner* (a), that the award must be considered as *prima facie* evidence of the want of reasonable and probable cause for arresting to so much larger an amount than that which the arbitrator had found to be due. As the agreement in question had taken place between the plaintiff and the defendant, when no person was

(a) 4 Ad. & El. 317.

present, the plaintiff ought to have been aware that he could not give evidence in support of a claim depending entirely on that alleged agreement. The defendant now, by his affidavit, denied the existence of the contract.

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PATTESON, J.—If the plaintiff knows, from the nature of his claim, that he can have no legal evidence in support of it, he ought to abstain from arresting the defendant. In the present instance, if he had considered the case, he must have known that he had no evidence in support of his claim. It seems to me that if the defendant's story were untrue, which I am not prepared to say that it was, still the plaintiff was bound, before he arrested, to consider whether he had legal evidence in support of his claim. I think it very likely that all the affidavits on both sides are bonâ fide; yet, both on the cases and on principle, the plaintiff ought not to have arrested for so large an amount. The present rule must, therefore, be made absolute.

Rule absolute.

BLAND v. DELANO.

THIS was an interpleader rule. Before the sheriff had obtained his rule in this Court, an action had been brought against him in the Court of Exchequer, and the sheriff therefore was not discharged.

Humfrey now, on behalf of the claimant, in whose favour a verdict had been found under the issue directed by the interpleader rule, moved that the proceeds of the

An application by a successful party, in an issue directed under the Interpleader Act, for costs, &c., may be made before judgment actually signed, but the

rule cannot be drawn up except on condition of its being signed.

Unless the sheriff has been guilty of misconduct, the Court will not order him to pay costs, &c., in an issue directed by the Court, in case of a default by the unsuccessful party.

The Court will allow a sheriff to deduct the expenses of a sale effected by the authority of the Court, under the Interpleader Act, although it appears, on the trial of an issue, that the seizure was wrongful.

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sale should be paid out of Court to the plaintiff, and that either the sheriff or the defendant should pay the costs of the issue, of the interpleader rule, and of this application.

Kennedy, on behalf of the sheriff, submitted, that no order could be made such as that required, because judgment had not yet been signed.

Humfrey admitted that judgment had not been signed at the time of obtaining the rule on behalf of the claimant, but there was no doubt it was now signed.

PATTESON, J.—I am of opinion that the rule ought to be made absolute; it may be drawn up on signing judgment, unless it is already done.

Kennedy submitted that there was no misconduct shewn, in this case, on the part of the sheriff, so far as this rule was concerned. He could not, therefore, be required to pay any costs in respect of it. He must, of course, pay the costs of the action in the Exchequer; but those were all to which he could be liable.

Chadwicke Jones appeared on behalf of the defendant in the issue, who was the execution creditor.

Humfrey, on the part of the plaintiff, contended that his client was entitled to the costs in question, first, against the execution creditor, and secondly, in case of his default, against the sheriff. The sheriff had seized goods which, according to the finding of the jury, he ought not to have seized. The sheriff had not been discharged, and therefore the successful party had a right to call upon the sheriff to pay the costs to which he had been put by the wrongful seizure of the goods. If the sheriff had paid

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in the amount of the goods, minus the expenses of the sale, then, as against the plaintiff in the issue, he ought to pay over the whole sum produced by the sale. Why was the plaintiff to look to an insolvent party, as the defendant in this case might turn out to be? Then, as to the costs of the interpleader rule: the sheriff had called a party before the Court for his own protection; the result was, that that party incurred great expense. It was now shewn that that party had been improperly brought before the Court. Why should not the sheriff pay that expense? Suppose it were the case of an ordinary plaintiff, whose goods were improperly taken by a defendant, would not the plaintiff there be entitled to the costs resulting from the seizure of his goods? The rule was, that the successful party should be put in as good a situation after the disposal of the rule as he was previous to the seizure. If therefore, Delano, the defendant in the issue, could not pay, the plaintiff was entitled against the sheriff to the costs of the issue, the interpleader rule, and this application.

PATTESON, J.—I should not make the sheriff pay costs except in a case where I saw he had been guilty of misconduct. In this instance the sheriff was not discharged by the rule; but that arose from its being brought to the knowledge of the Court that an action had been brought in the Court of Exchequer against the sheriff. It was therefore thought that his discharge by the rule in this Court might discharge him as to that action. But as to this Court, he remains in the same situation as he was when the rule was discussed. He would, in such a case, be entitled to no costs himself, and would have to pay none, unless it was shewn that he had been guilty of improper conduct, which I do not perceive to be the case here. Mr. *Humfrey*, therefore, is only entitled to have his rule

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absolute against the unsuccessful party himself, for the payment of the costs of the issue, of the interpleader rule, and of this application. I cannot deal with the action in the Exchequer, but, by consent, the proceedings in it may be stayed. With respect to the money paid into Court, the actual produce of the sale, deducting the expenses, will be all that can be paid out, because the sheriff effected the sale and paid the proceeds into Court for the benefit of all parties.

Rule absolute accordingly.

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"Witness, Henry King, attorney for the defendant, at his request," is a sufficient attestation within the 1 Reg. Gen. H. T. 2 Will. 4, s. 72.

It is not necessary that the attorney's declaration, prescribed by that rule, should be in writing.

A warrant of attorney to confess judgment generally of a term, is regular, notwithstanding Reg. Gen. H. T. 4 Will. 4, (Pleading Rules), if the judgment is signed on a particular day of term.

The plaintiff's attorney cannot attest such warrant on behalf of the defendant.

GODSON shewed cause against a rule nisi obtained by *Dowling*, for setting aside the warrant of attorney given by the defendant in this case, on the ground of irregularity. The objections to the warrant were—first, that the declaration by the attorney on behalf of the defendant, who was a prisoner on mesne process, was not sufficient, according to the directions contained in 1 Reg. Gen. H. T. 2 Will. 4, s. 72 (a); and, secondly, that the warrant was to confess judgment of a term generally, although, by 3 Reg. Gen. H. T. 4 Will. 4, (Pleading Rules), it was ordered, that "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day" (b). With respect to the first objection, it was submitted that the declaration was sufficient, according to the directions

(a) Ante, Vol. 1, p. 192.

(b) Ante, Vol. 2, p. 312.

of the rule. It was in these terms: "Witness, Henry King, attorney for the defendant, at his request." The words of the rule were, that the "attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be the attorney for the defendant, and state that he subscribes as such attorney." It was impossible for a more exact compliance with the rule to exist than was adopted in the present case. If any further declaration were necessary, the case of *Wallace v. Brockley* (a) clearly shewed that such a declaration might be made verbally. As to the second objection, the judgment had been entered up in term time, and, therefore, it was in conformity with the rule of Court. But that rule did not interfere with the warrant of attorney, because the object of that rule was to regulate the time from which judgments should take effect. Under these circumstances the present rule ought to be discharged.

Dowling, in support of the rule, contended that the warrant of attorney was not in sufficient compliance with the rule 1 Reg. Gen. H. T. 2 Will. 4, s. 72. The last direction of the rule was, that the attorney shall "declare himself to be the attorney for the defendant, and state that he subscribes as such attorney." This direction had not been fulfilled. It was quite consistent that the attorney was the attorney for the plaintiff, but in this particular instance he had acted for the defendant. This presumption was fortified by the fact of the warrant being directed to Mr. King himself. With respect to the second point, it must be presumed, that the warrant of attorney was to confess such a judgment as, by the rules of the Court, could be confessed. No such judgment as the one here proposed could be confessed, because no judgment could be

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(a) Ante, Vol. 5, p. 695.

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signed generally of a term, as it would only take effect from the particular day of signing.

Cur. adv. vult.

PATTESON, J.—In this case one objection taken was to the attestation of the warrant of attorney, which was in these words: “Witness, Henry King, attorney for the defendant, at his request.” It was contended, that the warrant was bad, because the attorney did not go on according to the language of the rule, “and declare himself to be the attorney for the defendant, and state that he subscribed as such attorney.” There are two cases in the Exchequer of *Wilson v. Price* (a), and *Robinson v. Brooksbank* (b), in which it was held, that the declaration need not be in writing. Of course, I feel myself bound by these two decisions, but it is not necessary to decide that point. The second objection was, that the authority given by the warrant of attorney was to confess a judgment of Hilary Term; and it was contended that such a judgment could not be signed now. It was said, that because it ought to be dated of a particular day, as judgments could not be signed generally of a term, such a judgment would be irregular, and therefore the warrant was an authority to sign an irregular judgment. I think the utmost limit to which that objection can be carried is, that it would not authorize a judgment to be signed in vacation. But in the present instance, the judgment was signed of a particular day in Hilary Term. I am of opinion, therefore, that this is not a valid objection to the warrant. But there is another objection, which, if founded in fact, is fatal to this instrument. It appears to be attested by the attorney for the plaintiff. In the case of *Hutson v. Hutson* (c), it was held, that under such circumstances,

(a) Ante, Vol. 4, p. 213.

(b) Ibid. p. 395.

(c) 7 T. R. 7.

"the presence of the plaintiff's attorney is insufficient, though the defendant consent to his acting as *his* attorney also." It is now admitted that Mr. King is the attorney at present for the plaintiff. It is sworn by Mr. Gompertz that the person witnessing the warrant is the attorney for the plaintiff. The attention of the parties was therefore drawn to that question; and it is not sworn that Mr. King was not the attorney for the plaintiff at that time. Besides, it is addressed to Mr. King himself, and generally, the person to whom a warrant of attorney is addressed is the plaintiff's attorney. Under these circumstances the case clearly comes within that of *Hulson v. Hulson*, and on that ground the rule must be absolute for setting aside the warrant of attorney. I wish to state most distinctly, that my opinion does not proceed on the ground of an alleged defect in the attestation, for the decisions in the Exchequer are decisive on the point. The form here adopted is the one commonly in use. I set aside this warrant of attorney on the simple ground that the person who witnesses the warrant of attorney on behalf of the defendant is the attorney for the plaintiff, and that, I think, is illegal. The present rule must therefore be made absolute.

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Rule absolute.

PRIOR and HENDRIE v. SMITH.

ARCHBOLD shewed cause against a rule nisi obtained by *Miller* for setting aside a judgment which had been signed by the plaintiff for want of a plea. The defendant, who was an attorney of the Common Pleas, had pleaded his privilege of being sued in his own court. The plaintiff treated this plea as a nullity, and signed judgment as for

The provisions of 1 Vict. c. 56, s. 4, do not deprive an attorney of his privilege to be sued in the Court of which he has been admitted.

A plaintiff cannot treat a

plea of such privilege as a nullity.

If the attorney has waived his privilege, the waiver must be replied.

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want of a plea. The question was, whether, since 1 Vict. c. 56, s. 4, an attorney of a particular court was entitled to plead his privilege, when sued in another. Another question was, whether such a plea could be treated as a nullity, or ought to have been made the subject of an application to the Court in which the plea was pleaded. As to the first point, it was contended that the 1 Vict. c. 56, s. 4, abolished such a privilege altogether. The words of the section were, "That any person who shall have been duly admitted an attorney in any one of her Majesty's Courts of Law at Westminster, shall be at liberty to practice in any other of her Majesty's Courts of Law at Westminster, although he may not have been admitted an attorney thereof; and that no person, having been duly admitted an attorney or solicitor in any of her Majesty's Courts of Law or Equity at Westminster, shall be prevented from recovering or receiving the amount of any costs which would otherwise have been due to him, by reason of his not being admitted an attorney or solicitor of the Court in which such costs shall have been incurred: provided always, that any attorney or solicitor practising in any court of law or equity shall be subject to the jurisdiction of such court as fully and completely, to all intents and purposes whatever, as if he had been duly admitted an attorney or solicitor of such court." The effect of this section was to enable a person who had been admitted as an attorney of one court to practise in all the courts, to sue for his fees for business done in any court, and subject him to the same jurisdiction as if he had been actually admitted of the court. So that, in contemplation of law, an attorney must be considered as attending on all of the Courts. No privilege, therefore, of one court could be considered as opposed to the privilege of another.

PATTESON, J.—The words of the statute shew that he may come here voluntarily; but he cannot be compelled to come here.

Archbold.—The reason of the attorney's privilege is, that he is deemed always to be attendant on the Court in which he is admitted. By the operation of this statute, he is virtually made an attorney of all the Courts. There is, consequently, now no presumption that he is attendant on one court more than on another.

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PATTESON, J.—Suppose a person only an attorney of the Common Pleas, and not of this Court, should bring an action in his own name, no doubt he would be liable to the jurisdiction of this Court in respect of all matters in that action. But suppose some client of his should apply against him in this Court for some matter not done in the action, but in his character of attorney, could this Court interfere with him?

Archbold.—I do not know that it could; but that does not necessarily decide the question in this case. The reason of the privilege ceases as soon as he is enabled to sue in all the Courts, as the reason was, that he was supposed to be always in attendance on his own Court. As now it cannot be presumed that he is in continual attendance on the particular court of which he is admitted, he may be in attendance on the others. The second question is, whether the plaintiff had a right to treat the plea as a nullity, and sign judgment as for want of a plea, or ought not to have applied to the Court in order to set it aside. If this were merely a demurrable plea, the plaintiff had no right to strike it out, and treat it as a nullity. But here, if I am right, the plea is a nullity, as it has been destroyed by the operation of the act of Parliament. The plaintiff was therefore right in signing judgment as for want of a plea. The other side would rely on various cases. First, the case of *Allen v. Walker* (a). There it was decided,

(a) Ante, Vol. 5, p. 460.

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that, in an action by the indorsee against the indorser of a bill of exchange, a plea that the defendant did not draw the bill is not a nullity, so as to entitle the plaintiff to sign judgment as for want of a plea. The reason stated by the Court then for that decision was, that the plea was only demurrable, as, in contemplation of law, every indorser was a new drawer of the bill. Again, *Cowper and Others v. Jones and Another* (a) would be cited. The Court there determined that the mere fact of a plea being clearly insufficient in point of law, is not a ground for signing judgment as for want of a plea. This case also came within the admitted principle, that a plea, which is merely demurrable, cannot be treated as a nullity. On the other hand, might be cited *Hopgood v. Wright and Others* (b). The marginal note of that case was, "Trespass against B., C., and D., for turning A. out of his house, and keeping the house and goods from him. Plea, that A. had nothing in the said house and goods, but 'jointly and undividedly with D.' Judgment signed for want of a plea, and held right." Again, in *Macher v. Billing* (c), the general issue was pleaded to part of a declaration, and the Statute of Limitations to the remainder, without the signature of counsel, and the Court of Exchequer held the whole plea to be a nullity. In *Warne v. Beresford* (d), the same Court held a rule to plead in a wrong name a nullity; and, in *King v. Myers* (e) Mr. Justice Coleridge held, that a plea of never did promise, in an action of debt, was a nullity. In the present instance, the plea is as much a nullity as the plea of non-assumpsit would be in an action on a bill of exchange, since the new rules of pleading, title assumpsit, rule 2 (f); or the plea of misnomer, since the 3 & 4 Will. 4, c. 42, s. 11. There can

(a) Ante, Vol. 4, p. 591.

(b) 2 N. R. 183.

(c) Ante, Vol. 3, p. 246.

(d) Ante, Vol. 4, p. 361.

(e) Ante, Vol. 5, p. 686.

(f) Ante, Vol. 2, p. 323.

be no difference whether the words directly forbid a plea, or take it away by necessary implication.

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Miller, in support of the rule, contended, that the section in question was far from abolishing the right to plead privilege in abatement, as the object of the statute was to extend, instead of abridging, the attorney's privileges. The statute must, therefore, be construed liberally. The privilege existed before the statute, and could not be taken away without express words. Before the passing of this act, an attorney might be admitted of all the courts, if he chose to incur the expense of paying the fees: if he thought proper to be so admitted of all the Courts, he was considered to have undertaken to be present, either by himself or his clerks, in all the Courts. Therefore, if he were sued in any one court, he could not plead in abatement the fact of his being an attorney of another. Now, the new act just leaves him in the same situation as before, except that it relieves him from the necessity of paying the fees of admission in the other Courts, of which he has not been formally admitted, if he chooses to become a practitioner of them. It allows him to go into all the Courts if he choose; but if he does not choose to do so, the act does not empower other persons to compel him to go there, he having been only admitted in one. If he were to come into this Court, and conduct a cause, and an action were afterwards brought against him here, it might be admitted that such conduct on his part would amount to a waiver of his privilege to be sued in his own Court; but then such waiver should be replied. In the case of *Jones v. Bodeenor* (a), it was resolved, "that if after the defendant has waived his privilege, he shall yet plead, the plaintiff in his replication must shew his waiver, and rely upon the estoppel." The proviso at the end of the clause in question, in the act of Victoria, is so worded

(a) 1 Ld. Raymond, 135.

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as clearly to limit the jurisdiction to which an attorney practising in any other Court than one of which he has been admitted, is liable to "such Court;" thus not extending it to the Courts generally. Therefore, no other Court has jurisdiction over him, but the one of which he has been admitted an attorney, unless he practise in some other, and then that Court also acquires jurisdiction, but none of the others in which he has not practised; and if, therefore, he be sued in any of them, he is as much entitled to plead his privilege as he was before the passing of the act. Then, as to the second point; the cases which have been cited on the other side, in support of the judgment, and in which the Court had determined that certain pleas might be treated as nullities, it would be found that those pleas were either in direct contravention of an act of parliament, or a positive rule of Court. Here, it could not be said that the plea was at all in contravention of any act or rule. The case of *Cowper v. Jones* is exactly in point. The question is, whether this plea is sufficient in point of law; and that is a question which ought to be decided on demurrer by the Court, and not by the party himself. If the Court were to give judgment against the defendant, still such judgment would only be, that he shall answer over; in which case he would then have an opportunity of pleading to, and trying, the action on the merits.

PATTESON, J.—I do not think that the case of *Cowper v. Jones* has any thing to do with the question here, as there the question was not, whether the plea was a nullity, but whether it was a sham plea, which the Court would, on application, set aside.

Miller contended that the plea here was good, and therefore could not be treated as a nullity by the plaintiff, so as to entitle him to sign judgment.

Cur. adv. vult.

PATTESON, J.—I am quite satisfied that the utmost effect which can be given to this act of parliament is, that if an attorney of one Court should choose to practise in another, he would become subject to the jurisdiction of that Court for any thing in which he acted as an attorney in that count, and a question might be raised whether he would not so far render himself an attorney of that Court, as to be amenable to that Court in any matters connected with his character of attorney. I think that is the utmost extent to which the operation of this statute can be carried, though I do not say that it can be carried so far. The act of parliament, by itself, does not render an attorney liable to the process of another Court, so as to destroy his privilege. Therefore, if it could be said that the attorney had done any act by which he had waived his privilege, that is a question of fact, and, therefore, a matter of reply. In the present case, therefore, if the plaintiff means to say that the defendant has done any act by which he has waived his privilege, and rendered himself liable to the jurisdiction of this Court, he should have made it a matter of reply. The plea must, therefore, stand, and the judgment be set aside with costs, as it is a strong measure to sign judgment for want of a plea.

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Rule absolute, with costs.

— *2 L. R. Mod. C. 154.*

DOE *d.* CLARKE and Others *v.* STILLWELL and Another.

PLATT shewed cause against a rule nisi for an attachment obtained by the *Attorney-General* for the non-performance of an award. He objected to the affidavit, which proved the execution of the power of attorney, authorising the demand of the execution of the award, on the ground that the affidavit was not entitled in the cause.

The affidavit of the execution of a power of attorney to demand the performance of an award, must be entitled in the cause.

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The *Attorney-General* contended that as this application was a matter *dehors* the cause, it was unnecessary for the affidavit in question to be entitled in the cause. The arbitrator, by directing a verdict to be entered in a particular way, had disposed of the cause. The proceeding by attachment was independent of the cause therefore.

COLERIDGE, J.—Here, the demand of the performance of the award was made under a power of attorney. No affidavit, not entitled in the cause, can be used to prove the execution of that power. I never heard of the distinction now sought to be introduced.

Rule refused.

BALMANNO v. MAY.

An affidavit of debt "for money found to be due upon an account stated," is sufficient, without alleging that it has been "settled," or that a "balance" has been struck.

R. V. RICHARDS shewed cause against a rule nisi obtained by *W. H. Watson*, calling on the plaintiff to shew cause why the defendant should not be discharged out of custody, on the ground of a defect in the affidavit of debt. The affidavit was in this form:—

"Alexander Balmanno, of No. 18, Queen street, Cheapside, in the city of London, merchant, trading under the style or firm of Alexander Balmanno & Co., maketh oath and saith, that Stribblehill Norwood May is justly and truly indebted unto this deponent in the sum of eight hundred pounds and upwards, for money found to be due from the said Stribblehill Norwood May to this deponent upon an account stated between them, for money lent and advanced, and paid, laid out, and expended, by this deponent, for the use of the said Stribblehill Norwood May, and at his request, and also for interest upon and for the forbearance to the said Stribblehill Norwood May, by this deponent, at the request of the said Stribblehill Norwood

May, of monies due and owing from him, the said Stribblehill Norwood May, to this deponent, and also for work done by this deponent as the factor and agent of and for the said Stribblehill Norwood May, in and about selling and disposing of divers goods of the said Stribblehill Norwood May, and in and about other business of the said Stribblehill Norwood May, and on his retainer, and for commission and reward due, and of right, payable from the said Stribblehill Norwood May to this deponent in respect thereof. And this deponent saith, that no offer or tender hath been made to pay the said sum of eight hundred pounds, or any part thereof, to this deponent, but that the whole thereof still remains justly due to him."

The objection to the affidavit arose upon the words "money found to be due from the said Stribblehill Norwood May to this deponent, upon an account stated between them." In support of the objection was the case of *Hooper v. Vestris* (a), in which it was held that an affidavit of debt, stating the defendant to be indebted to the deponent "on an account stated between them" is insufficient. In the same volume, however, was the case of *Tyler v. Campbell* (b), where it was held by the Court of Common Pleas that in an affidavit of debt it is sufficient to allege the claim to be due "on the balance of an account stated," without the words "and settled." In the case of *Debenham v. Chambers* (c), a count in assumpsit stated the defendant to be indebted to the plaintiffs and their deceased partner "for money found to be due upon an account then stated between them;" and after laying the promise to the three, assigned as a breach that the defendant had not paid. The Court of Exchequer there held that the count was sufficient on special demurrer. There, it was intimated, both by Baron *Parke* and Baron *Alderson*, that no more strictness was required in the affidavit of debt

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(a) Ante, Vol. 5, p. 710.

(b) Ibid. p. 632.

(c) Ante, p. 101.

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than in a declaration. The affidavit in the present case differed from those in the cases cited. Here, the affidavit alleges the account to have been stated in respect of causes of action, which would justify the defendant's arrest. In the cases cited, however, the account might have been stated with respect to matters which would not justify the arrest of the defendant. Under these circumstances, it was contended that the affidavit of debt was sufficient.

W. H. Watson, in support of the rule, submitted that, if the authorities were examined they would be found to support the present application. In the case of *Tyler v. Campbell* the question was not discussed, but the Court of Common Pleas merely refused to interfere. There was a material distinction between that case and the present. The affidavit there stated a "balance" to be due upon an account stated. Here the words were simply "an account stated." The case of *Debenham v. Chambers* was no authority at all upon this question, as the point upon which that case proceeded was the sufficiency or insufficiency of the form given by the rules of T. T. 1 Will. 4. Any thing that was there said was merely obiter. A great difference existed between a count in a declaration and an affidavit of debt. Any averment in the declaration might be traversed, but no averment in the affidavit of debt could be traversed. The case of *Hooper v. Vestris* therefore, remained unimpeached, and was a direct authority in support of the present application.

Cur. adv. vult.

PATTESON, J.—In this case the question was, whether the affidavit to hold to bail was sufficient or not. The discussion on the argument turned on the case of *Hooper v. Vestris*. In that case, a former one, which had been decided in the Common Pleas, was not brought before the notice of my brother *Coleridge*. I have a difficulty in see-

ing the distinction between an affidavit for the "balance" of an account before stated between the parties, and "an account stated" merely without the word "balance." I think that there is nothing peculiar in that particular word. It must be presumed that an account has been stated after a discussion between the parties. In the case of *Visger v. Delegal* (a), the Court held that an affidavit of debt "on a balance of an account for money paid, laid out, and expended by the plaintiff to and for the defendant, and at his request, and for money had and received by the defendant for the plaintiff, and for interest on monies due from the defendant to the plaintiff" was not sufficiently certain. The Court there observed, "without the words 'on balance of account' the affidavit would clearly be bad. Those words, however, only imply that the defendant was originally indebted to the plaintiffs, on the account stated in the affidavit, in a larger rent, which has been reduced by a set-off to 1000*l*." The case is therefore left in the same uncertainty as if no balance had been mentioned." Since that case *Debenham v. Chambers* was decided. There, the attention of the Court of Exchequer was called to the form of the declaration in relation to the rules of T. T. 1 Will. 4. The question then arose on special demurrer, and Mr. Baron *Parke* said, "the case of *Hooper v. Vestris* arose upon an affidavit to hold to bail, and I question whether more strictness is required in an affidavit than a declaration." The Court of Exchequer having given this intimation, and it being desirable that the same decision should be pronounced in every Court, and it being rather absurd that an affidavit of debt should be in one form and a declaration in another, I think it is better to hold that this affidavit is sufficient. An "account stated" between the parties, would mean that the parties had settled it between them after discussion. Any man, not

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(a) Ante, Vol. 1, p. 333.

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a lawyer, would have the impression that that was the meaning of the allegation. If the account had not been stated and agreed between them, I think the person swearing in that form would be liable to an indictment for perjury. I have spoken to my Brother *Coleridge* and the other Judges, and we are all of opinion that, as the count is good, the affidavit in the same form is good also. The word "balance" makes no difference. The present rule must therefore be discharged without costs.

Rule discharged, without costs.

See In re Hood. 6. D. L. 154.

SIMES v. GIBBS.

Affidavits in support of an application against an attorney to compel him to deliver up a document, may be entitled in the action out of which the claim arises, although judgment has been signed and execution issued.

An attorney is liable to the summary jurisdiction of the Court for misconduct, while one of its officers, although at the time of an application against him he has ceased to be an attorney.

PETERSDORFF shewed cause against a rule nisi, requiring an attorney named Humfrey to deliver up a bill of exchange. He objected to the entitling of the affidavit on which the rule had been obtained, on the ground that it was entitled in the cause out of which the alleged claim to the bill of exchange arose. In that action judgment had been signed and execution issued. The cause was at an end, and therefore it was improper to entitle the affidavits in that manner. They should have been entitled "In the matter of Humfrey." Another objection was, that Mr. Humfrey had ceased to be an attorney of the Court.

PATTESON, J.—I think that the affidavits are properly entitled in the cause out of which the claim to the bill is alleged to have arisen, although that action may be at an end. With respect to the fact of Mr. Humfrey having ceased to be an attorney of the Court since this action arose, I do not think that is any answer to the present application. If a man be once an attorney, he cannot get rid of the summary jurisdiction of this Court with respect to

what he has done while an attorney, by ceasing to be an officer of the Court. The rule is, once an attorney always an attorney, for that purpose. As it appears by the affidavit, that, at the time of the transaction out of which this application has arisen, he was an attorney of this Court, it does not lie in his mouth to say he is not one now.

The rule was afterwards made absolute on the merits.

Rule absolute.

Ex parte WARE.

WALKER applied for leave to be allowed to add, on the roll of attornies of this Court, the name of Ware as the additional surname of Mr. Titus Hibbert. That gentleman, whose name was already on the roll, had lately, for private reasons, assumed the latter name. It was therefore desirable that it should be added to the names already on the roll.

Where an attorney, whose name is on the roll, assumes an additional surname, the latter may be added to that already on the roll.

PATTESON, J.—That may be done.

Application granted.

Ex parte BAILEY.

J. BAYLEY moved for a writ of habeas corpus to bring up the body of Jane Bailey from the custody of her aunt, who was resident at Chatham, in Kent. The girl was an infant of fifteen, and the application was made at the instance of her mother. Her father was still alive, but had lately been convicted of felony, and was now in custody at the hulks, under sentence of transportation. On this state

Where the father has been convicted of felony, the Court will grant a habeas corpus, in order to give the mother the custody of an infant.

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of facts, it was submitted, that the mother was entitled to the custody of the infant.

PATTESON, J.—You may take your writ.

Writ granted.

WELLER'S Bail.

If an affidavit of sufficiency by bail, whether town or country, attempts to describe the property in respect of which it is sought to justify, the form given by the rules of T. T. 1 Will. 4, must be strictly adopted.

BUTT opposed the bail in this case, on the ground of a defect in the affidavit of sufficiency, which had been made in pursuance of 3 Reg. Gen. T. T. 1 Will. 4, (a). The defendant stated himself to be worth property to the required amount, over and above all his just debts, in the usual form. He then described his property to consist of household furniture at his dwelling-house, which he described, but did not state the value of that furniture. No other property was mentioned in the affidavit as being that in respect of which the bail justified. By the form which the rule gave the affidavit ought to state the value of the property. It was consistent with this statement, that the household furniture was not worth near the full amount for which the defendant sought to become bail, although he had secured himself against an indictment for perjury, if he owned property of another description, which might be colourably worth the sum for which bail was required. He cited *Cooper's bail* (b). This omission, it was submitted, was an essential part of the form attached to the rule.

Cooper submitted that the rule in question did not apply to country bail, and the present case was one of country bail.

(a) Ante, Vol. 1, p. 103, 106.

(b) Ante, Vol. 3, p. 692.

Butt cited *Penson's bail* (a), where it was held that if a defendant, in justifying his bail, adopts the new practice under Reg. Gen. T. T. 1 Will. 4, he must conform to it strictly; and, therefore, an affidavit of sufficiency, though good by the old practice, but defective by the new, is insufficient. The defendant here had attempted to justify according to the new rules, and therefore he was bound to pursue them strictly.

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PATTESON, J.—By the old practice, with respect to country bail, no description of property was required. But here, an attempt is made to adopt the new form. It must, therefore, be in pursuance of that form. I lay it down broadly and pointedly, that where an affidavit of sufficiency, either in the case of town or country bail, attempts to describe the property in respect of which the bail seeks to justify, the form prescribed by the rule of T. T. 1 Will. 4, must be followed. The defendant may, however, have leave to amend, on payment of costs.

Rule accordingly.

(b) Ante, Vol. 4, p. 627.

BROOK v. FINCH and Another.

KELLY shewed cause against a rule nisi obtained by *Byles*, for arresting the judgment in the present case. It was an action of trespass tried at the Summer Cambridge Assizes in the year 1836, and a verdict was found in favour of the plaintiff, with 20*l.* damages. The defendant appeared at the trial by counsel. In the following term, a motion was made for a new trial, on the ground, that in the issue there was no similitur to the replication, but the words "et cetera" only were added at the end of that pleading. The rule for a new trial was refused, and now,

The omission of a formal similitur is sufficiently supplied by an "&c.," although the omission is in the issue itself.

Semble, that the rule of 1 Reg. Gen. H. T. 2 Will. 4, s. 65, as to motions in arrest of judgment, only applies to trials in term.

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by leave of a Judge at Chambers, the present application was made. The defendant had pleaded a plea of payment into Court. The replication to that plea was in this form; "the plaintiff says that he has sustained damages to a greater amount than the said sum of 20*l.*, and this he prays may be inquired of by the country, &c." No formal similiter had been delivered by the defendant, nor was there any in the paper issue, but it was added correctly on the nisi prius record. It was contended that no issue had been actually joined, and consequently that no legal judgment could be pronounced upon the record. If there were any objection in this, it had clearly been waived by the defendant. The issue with an "&c." had been accepted, and the nisi prius record correctly made up. No objection had been taken to the record. The parties went down to trial, and no objection was made that there was any variance between the issue and the record: no notice was given that any such objection would be taken in the Court above; and in the following term, a motion was made for a new trial, without any alternative for a motion in arrest of judgment. No leave was then reserved to make this motion, but it was given at a subsequent period on summons to apply to arrest the judgment. After all these proceedings the present application must be considered as too late. By 1 Reg. Gen. H. T. 2 Will. 4, s. 65 (a), it was ordered that "no motion in arrest of judgment, or for judgment non obstante veredicto, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the jury-process be returnable in the same term." A question might therefore arise whether, four days after the return of the jury-process, such a motion as the present is not clearly too late.

(a) Ante, Vol. 1, p. 191.

COLERIDGE, J.—That rule seems to be intended merely for cases to be tried in term.

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Kelly.—I do not rest the case on that rule, more than to shew that the Court has been disposed to shorten the time within which such applications are made.

Byles admitted that the application in an ordinary case might, perhaps, be too late. But leave having been obtained from a learned Judge to make it now the question, whether, under other circumstances, it might not be too late, did not arise.

COLERIDGE, J.—By the strict old practice, the motion might be made at any time before judgment signed, even after a motion for a new trial.

Kelly admitted that, in the case of *Cowper v. Spencer* (a), it had been decided that the want of a similiter was not aided or amended after verdict; but, in *Siboni v. Kirkman* (b), where a replication traversed the facts contained in the plea, and concluded to the country, but without an “&c.,” and no similiter was added, the Court of Exchequer held, that the omission might be considered as a misprision of the clerk, and amendable after verdict, judgment, and writ of error brought. In *Sayer v. Pocock* (c), a replication was amended after verdict, by inserting the similiter instead of “&c.” There, Mr. Justice *Aston* said, “There is a case of *Cowper v. Spencer* (d), where the plaintiff replied de injuriâ suâ propriâ, concluding to the country, without any similiter added; the Court there held it was no issue; but it does not appear in that case that absque tali causa was added, nor that the conclusion to the country was followed by an ‘&c.’ But here the plaintiff has

(a) 1 Str. 641.

(c) 1 Cowp. 407.

(b) Ante, p. 98.

(d) 8 Mod. 376; S. C. Str. 641.

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added ‘&c.’ consequently, he meant something by it. Again, in the case of *Cowper v. Spencer*, it does not appear whether any defence was made or not. But here there was a defence made. If the ‘&c.’ added in this case could be construed to supply the place of the similiter, it would only be issue misjoined, and cured by the statutes of jeofails; but if it cannot be so construed, then it is not within the statutes of jeofails, and the only question is, whether it is amendable.” In *Cooke v. Burke* (a), where the parties had gone down to trial on a plea which had not been traversed, after verdict for the plaintiff, he was permitted to amend, by adding a traverse, and the defendant’s motion in arrest of judgment was discharged, upon payment of costs by the plaintiff of both motions. This was a clear authority to shew that if the omission did amount to an objection, it was amendable. There was a case of *Griffith v. Crockford and Another* (b), the marginal note of which was, “Omission to add the similiter is an irregularity, for which the Court will set aside the verdict.” The report in that case was exceedingly short, and no reasons were given by the Court for their judgment. If it were examined, it would be found really not to amount to any authority on the point. In *Swain and Others v. Lewis* (c), “to an action on a bill of exchange against an indorsee, the defendant pleaded that he had no notice of presentment, and concluded his plea to the country. The plaintiff omitted to add the similiter, and, after a verdict for the plaintiff, the defendant moved for a new trial, because there was no issue joined; but as the plea concluded with an ‘&c.’—*Held*, that, after verdict, the ‘&c.’ might be considered to include the similiter, and that the record was sufficient.”

But it was to be observed, that the objection now taken did not appear on the face of the record, for it was admitted that the nisi prius record was correct. It was sug-

(a) 5 Taunt. 164.

(b) 3 B. & B. 1.

(c) Ante, Vol. 3, p. 700.

gested that the defect arose in the issue itself. The case of *Combe v. Pitt* (a), where a new trial was moved for on the ground that the plea roll contained nothing but the declaration and the plea of nil debet, when it was contended that a plea in abatement, before pleaded, ought to have been entered, the Court held, that, at all events, the irregularity was cured by the defendant's accepting the issue. A variety of authorities to the same effect were collected in the note to *Doe v. Cotterell* (b). In *Clark v. Nicholson* (c), it was decided that if a replication conclude to the country, with an "&c.," and no similiter be added, the Judge will try the cause, as the "&c." is sufficient. And, in *Stockdale v. Chapman* (d), the Court of King's Bench refused to grant a new trial, moved for by the defendant, on the ground that no similiter had been added to a replication concluding to the country, and that the absence of a similiter was not supplied by an "&c.," where no objection was made to the issue until after verdict.

In the first place, then, the omission was an irregularity, of which advantage should have been taken on the delivery of the issue. Secondly, no authority could be found in which the Court had arrested the judgment where an "&c." had been introduced; as those words must be considered as including a similiter. For these reasons, the present rule ought to be discharged.

COLERIDGE, J.—I do not see any defect in any record. Is there any record in which this objection appears? How can you get at this objection, except on affidavit?

Byles.—The original rule for a new trial was obtained on affidavits.

COLERIDGE, J.—This motion must be made on the nisi prius record, as there is no other in existence.

(a) 3 Burr. 1682.

(b) 1 Chit. Rep. 277.

(c) 6 C. & P. 712.

(d) 6 N. & M. 711.

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Byles.—There is an incipitur of a record in existence, which is to be made up from the paper issue. That is the only document from which the record can be made up. That record, so made up, is, in contemplation of law, now before the Court.

Kelly referred to 15 Reg. Gen. H. T. 4 Will. 4, (pleading rules) (*a*), the words of which were, “the entry of proceedings on the record for trial, or on the judgment roll, (according to the nature of the case), shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record; and no fee shall be payable in respect of any prior entry made, or supposed to be made, on any roll or record whatever.” *Reeder v. Bloom* (*b*), was an authority to the same effect. Mr. Tidd (*c*), laid down the rule that “the parties cannot move in arrest of judgment, for any thing that is aided after verdict at common law; or amendable at common law, or by the statutes of amendments; or cured, as matter of form, by the statutes of jeofails.”

Byles.—All the cases cited, as well as 15 Reg. Gen. H. T. 4 Will. 4, are consistent with the validity of this objection. First, the objection would have been good before the new rules. This is not a case where the parties are actually at issue, and the nisi prius record only is defective; but it is a case where no issue was ever joined at all. The plaintiff did not add the similiter to his replication, as he might have done; nor did the defendant ever rejoin the similiter, nor did the plaintiffs add the similiter on making up the issue. The defendants might have demurred, or confessed the action, or suffered judgment by default. The parties, therefore, went to trial without any issue joined, the witnesses could not be indicted for perjury,

(*a*) Ante, Vol. 2, p. 320.

(*b*) 2 Bing. 384.

(*c*) 1 Prac. 919, Ed. 9.

and the trial was a mis-trial. The similiter is not mere matter of form, but is as much a rejoinder as any other answer to the replication. Judgment of non-pros may be signed for want of it. *Hollis v. Buckingham* (a). Judgment, as in case of a nonsuit, cannot be signed if it be wanting, nor even if it be doubtful whether it be wanting or no. *Gilmore v. Melton* (b), *Brown v. Kennedy* (c), *Brook v. Lloyd* (d), *Martin v. Martin* (e). The statutes of jeofails do not cure the defect. The 32 Hen. 8, c. 30, which is the only statute curing irregularity in the issue, cures mis-joinder only, not *non-joinder*. Com. Dig. Pleader R. 12. In *Cowper v. Spencer* (f), it was held that the statute did not cure the absence of a similiter. Nor does the statute of amendments, 8 Hen. 6, c. 15, help, for that only applies to misprision of the clerk, not of the parties. Besides, the issue, which is to be considered as a copy of the plea roll, cannot be amended by the nisi prius record (g). This is not an irregularity which may be waived, for an irregularity is something dehors the record. *Garratt v. Hooper* (h), *Roberts v. Spurr* (i), *Hanson v. Shackleton*, (k), *Nunn v. Curtis* (l). And if it had been an irregularity, it was not waived, for the defendant did not know of it till notice of trial had been given, and he came at the first moment to the Court. *Crow v. Edwards* (m), shews that even consent of parties will not cure a mis-trial. The proper mode of taking advantage of this defect is, by motion in arrest of judgment. The roll before the Court, on which the judgment is arrested, is erroneous. The judgment was arrested in *Cowper v. Spencer*, and that was the form of the application; and the learned Judge who dis-

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(a) 3 D. & R. 1.

(b) Ante, Vol. 2, p. 632.

(c) Ibid. 639.

(d) 1 M. & W. 552.

(e) 2 Bing. N. C. 240.

(f) 1 Stra. 641; 8 Mod. 376,

S. C.

(g) Gilbert's C. P. 186.

(h) Ante, Vol. 1, p. 28.

(i) Ante, Vol. 3, p. 551.

(k) Ante, Vol. 4, p. 48.

(l) Ibid. p. 729.

(m) Hobart, 5.

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charged the former rule in this case, appears to have considered that the defendant should move in arrest of judgment. All the cases cited on the other side, except two, *Cowper v. Spencer*, and *Griffith v. Crockford*, are cases where the parties had, so far as appears, actually joined issue; but the similiter was merely omitted in the nisi prius record, which is but a transcript. In *Cowper v. Spencer*, however, the defect was in the paper issue, and there, judgment was arrested. So in *Griffith v. Crockford* (a), the similiter was wanting in the issue; but though there was an "&c.," and the nisi prius record contained the similiter, and the party who afterwards sought to set aside the verdict attended at the trial, yet the Court in that case granted a new trial for want of the similiter in the issue. In the only two cases, therefore, in which this objection to the want of a similiter, in an issue made up by the parties, has hitherto been taken, it has prevailed. Although it does not appear in the statement of the facts in *Sayer v. Pocock*, that the paper book was defective, yet it must be admitted that, on reading the whole case, that seems to be so. But the paper book at that time was made up by the officer of the Court, and the omission of the similiter was his misprision, and on that ground, Lord *Mansfield* held that the "&c." might afford ground to amend on a cross motion. *Sayer v. Pocock* was cited in *Griffith v. Crockford*. Before the new rule, therefore, it seems, that both on principle and authority the absence of a similiter in the issue itself would be a fatal objection, and that the "&c." would not supply it, though it may have had that effect on the nisi prius record, and though the Court would amend a paper book made up by the officers of the Court on a proper motion for that purpose. Secondly, the new rules have no effect in removing this objection. It is suggested that as 15 Reg. Gen. H. T. 4 Will. 4, directs that the entry on the record for

(a) Better reported in 6 Moore 51.

trial, or on the judgment roll, shall be taken to be, and shall be, in fact, the first entry of the proceedings in the cause upon record, therefore, the entry on the nisi prius record is the first and only entry of record in the case, and that as the nisi prius record is here correct, there is, since the new rules, nothing whereon to ground this motion. But that depends on the meaning of the expression 'entry on the record for trial.' It is submitted that this expression refers to the entry or incipitur on the plea roll, at the time of passing the record for trial, and not to any entry on the nisi prius record. When the record is passed and sealed at the nisi prius office, an incipitur was always, and is still, made on a roll which is kept among the records of the courts, and on which (if need be) the proceedings are afterwards continued at length and preserved in the treasury of the court. It is called the plea-roll till judgment, and the judgment-roll after. That this is what it means seems clear from the mention of the judgment-roll in the same clause of the rule. And the rule, in this sense, is very reasonable and necessary. For before this rule there were, or were taken to be, prior entries on the process roll, the warrant of attorney roll, the imparlance roll, and the recognizance roll, all of which this rule abolishes, leaving only that which, at one period of the suit, is called the plea roll, at another the judgment roll. If the meaning of the rule is, that the entry on the nisi prius record shall be the only entry, how is that an incipitur on the plea roll, the entry of the issue, as it is called, is still required by the practice of all the Courts, except where by express rule it is rendered unnecessary? And the entry of which the rule speaks is an entry "upon record," whereas what is vulgarly called the nisi prius record is not a record at all, but a mere transcript from the real record to send the issue into the county for the judges to try (a). Besides,

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(a) Gilbert's C. P. 145, 146.

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it never could be intended to make or treat that as a record of the Court which is always in the custody of the successful party. Would an examined copy of the nisi prius record be evidence? It is clear, therefore, that the rule by the expression entry on the record for trial, means the entry on the plea roll. This plea roll is in contemplation of law always at the judges' feet, proceeding *pari passu* with the cause. The paper issue was anciently a copy of this plea roll when complete (*a*), and when the plea roll is made up, it must follow the form of the issue (*b*) and not the form of the nisi prius record, which is, or at least used to be, very different. As therefore the plea roll, when made up, must follow the issue, the Court must now look at the issue, which is what the roll will be. The plea roll cannot be amended by the nisi prius record. Lord C. B. *Gilbert* says, C. P. 146, "The plea roll may be amended by the imparlance roll, but not by the nisi prius roll, which is but a transcript from the plea roll." The defect, therefore, is now as fatal as ever. And in *Siboni v. Kirkman*, which was since the new rules, it seems to have been taken for granted on all hands that the omission of *similiter* was error, though the Court, under the peculiar circumstances of that case, amended. In *Worthington v. Wigley* (*c*), a new trial was granted for a defect in the issue, though the nisi prius record was right.

COLERIDGE, J.—This case has been argued with great learning on both sides; but I think it may be disposed of on a simple point, which is the ground of my opinion that the rule ought to be discharged. This is a motion in arrest of judgment, and it cannot be doubted, that I must see that the error suggested exists on some record really made, or supposed to be made, in contemplation of

(*a*) Boote's Suit at Law, p. 180. Amendment T. 1.

(*b*) 1 Roll's Ab. 698; *Parsons v. Gill*, 1 Salk. 50; Com. Dig. (c) Ante, Vol. 5, p. 209.

law. There was a plea of payment of money into Court, in the usual form. The plaintiff replied that he had sustained damages to a greater amount than the sum paid in. There was no formal rejoinder but an "&c." put at the end of the replication. In this state the pleadings remained, and the Court of Nisi Prius disposed of the nisi prius record, in which there was a similiter. I at first thought, that the nisi prius record might be, and must be, understood to be the only record at which I could look. I have not formed a clear opinion upon that point. But supposing that it is not, it is said that I must look at the plea roll which is in existence in contemplation of law. Of what is the plaintiff to make it up? He will make it up from the pleadings, in which there is an "&c." I must presume that he will make it up as he has made up the nisi prius record. That will be a perfect record. Therefore, *quâcunque viâ*, I do not find why I should presume that he will not make a perfect record. The present rule ought therefore to be discharged.

Rule discharged.

GALE and Others *v.* HAYWORTH.

W. H. WATSON shewed cause against a rule obtained by *J. Bayley*, for staying proceedings on the bail-bond on payment of costs. The question was, whether the bail-bond ought to stand as a security. That would depend upon the dates. It was a London cause, and the defendant residing more than forty miles from town, he was entitled to fourteen days' notice of trial. The rule was moved for on the 19th, and the first sittings at which the plaintiff could try were on the 30th. Consequently no trial could be lost until then. The question was, however, whether it was necessary that a trial should have been lost at the time of moving for the rule, in order to entitle the plaintiff to the bail-bond as a security.

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On an application to stay proceedings on the bail-bond on payment of costs, the plaintiff will not be entitled to have the bond stand as a security, if a trial have not been lost at the time of moving for the rule.

If the application be made at the instance of the bail, the Court will not impose terms on the defendant.

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J. Bayley, in support of the rule, contended, that the plaintiff could not be entitled to have the bail-bond stand as a security, unless at the time of moving for the rule a trial had been lost. He cited *Stride v. Hill* (a), and *Crossby v. Innes* (b), which were authorities to that effect.

W. H. Watson then contended that some terms should be imposed on the defendant with respect to notice of trial.

J. Bayley contended, that as this application was made at the instance of the bail only, no terms could be imposed on the defendant. He cited *Call v. Thelwell* (c), which clearly supported that proposition.

PATTESON, J.—I cannot distinguish this case from *Stride v. Hill*, and *Crossby v. Innes*, in which the Court laid down the rule, that a trial must have been lost at the time of applying for the rule, in order to entitle the plaintiff to have the bail-bond stand as a security. Here, the dates are still stronger than in those cases. It is quite clear that no trial had been lost at the time of moving for the rule; therefore I cannot direct the bail-bond to stand as a security. With respect to imposing terms on the defendant, the case of *Call v. Thelwall* is an authority to shew, that where the bail only make the application, no terms can be imposed upon the defendant. The present rule must therefore be absolute on payment of costs.

Rule accordingly.

(a) Ante, Vol. 4, p. 709.

(b) Ante, Vol. 5, p. 566.

(c) Ante, Vol. 3, p. 443.

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JAMES moved for a rule to shew cause why the notice of declaration in this case should not be set aside, on the ground of the defendant not having been served with process. The defendant, in his affidavit, swore that he had not been served; but he did not proceed to swear that the process had not come to his knowledge.

PATTESON, J.—I think that is insufficient.

James submitted, that as it appeared, from the other affidavits on which he moved, that the service of the process had been effected on another person, that, at least, was sufficient to entitle him to a rule nisi. The other side might shew what the circumstances of the service really were.

PATTESON, J.—But the defendant should swear that the process never came to his knowledge. I shall, therefore, not grant the rule.

Rule refused.

In order to entitle a defendant to set aside a notice of declaration, on the ground of not being served with process, it is not sufficient for him to swear simply that he has not been served, although it may appear by other affidavits that the service was effected on another person.

COURT OF EXCHEQUER.

Hilary Term,

IN THE FIRST YEAR OF THE REIGN OF VICTORIA.

The Earl of SPENCER v. SWANNELL.

Nil debet is a good plea to an action on the 2 & 3 Edw. 6, c. 13, for not setting out titles.

DEBT on the 2 & 3 Edw. 6, c. 13, s. 1, for treble value of tithes not set out. Plea, nil debet. Special demurrer, assigning for cause that the plea of nil debet is not allowable in any action.

The Court called upon *Henderson* in support of the plea.—The rule of H. T. 2 Will. 4, applies to cases of contract only. *Littledale*, J., has expressed that opinion in *Faulkner v. Cherell* (a). The plea of “never indebted” resembles the plea of non-assumpsit, and is only applicable to cases where there is a contract express or implied. 2ndly, The 21 Jac. 1, c. 14, s. 4, enacts, “that if any information, suit, or action shall be brought or exhibited against any person for any offence committed against the form of any penal law, it shall be lawful for the defendants to plead that they are not guilty, or that *they owe nothing*.” This is clearly a penal action: *Radford v. M’Intosh* (b), Dwarris on Statutes (c). This defence, then, being given by statute, falls within the proviso of the rule. In 2 Inst. 651, it is said, that “this action of debt is no action of debt within the statute of 23 Hen. 8, because it is neither upon a specialty nor by contract; neither is this action upon this statute any action for wrong personal immediately done to the plain-

(a) 5 Ad. & El. 215.

(b) 3 T. R. 632.

(c) Page 642.

tiff, for it is a non-fesance, viz., a not setting out of the tithes. Trin. 43 Eliz. in communi banco, adjudged in an action of debt for the treble value upon this statute, not guilty or nil debet, are good uses; and so upon the statute of 5 Eliz. upon perjury: *Johns v. Carne* (a).” The Statute of Limitations does not extend to actions of this description: *Talory v. Jackson* (b). Before the late rule, either nil debet or not guilty were good pleas to this action: *Bawtry v. Isted* (c); and if the right of a general traverse under the plea of not guilty is not affected by the rule, it is difficult to suppose that the rule was intended to take away the plea of nil debet. But, assuming the plea is not allowable, this is not the proper mode of taking the objection, but application should have been made to a Judge to set it aside. [*Parke, B.*—The pleading rules have become part of the law of the land, and, if the plea is bad, the objection is properly taken on demurrer.]

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Newman, in support of the demurrer.—Nothing can be more general than the terms of the rule, viz, “that the plea of nil debet shall not be allowed *in any action*.” [*Parke, B.*—The question is, whether, supposing it to be within the words of the rule, the Judges had any power to take away a plea given by statute. No doubt, it was the intention to do so; but the true construction of the rule is to abolish the plea in all cases in which we have the power to do so.] This is not a penal, but a remedial action: the current of authorities so consider it. The right to plead nil debet was not given by the statute of James, but existed at common law. That statute applies to actions by the king, or at the suit of a common informer. The 31 Eliz. c. 5, which limits the time within which penal actions are to be brought, has been held not to apply to actions

(a) Cro. Eliz. 621.

(b) Cro. Car. 513.

(c) Hob. 218.

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brought by the party grieved: *Calliford v. Blawford* (a). If this had been a penal action, the 31 Eliz. would have applied. In this action, the Courts will grant a new trial where the verdict is against the weight of evidence, which is never allowed in a penal action. The statute against gaming, 9 Anne, c. 14, has been considered *remedial* when the action is brought by the party injured, but penal where brought by a common informer: *Bones v. Booth* (b). The 4 Anne, c. 16, enabling a defendant to plead several matters, does not extend to penal actions; and yet, in this form of action, the defendant has been allowed to plead double. But even if it is a penal action, "not guilty" is the proper plea, and not nil debet.

Cur. adv. vult.

PARKE, B.—This was an action of debt for treble value for not setting out tithes, to which there was a plea of nil debet. To this plea the plaintiff demurred, and assigned for a special cause, that it was a plea not allowed by the pleading rules. The case was argued late in last term before my Brothers *Alderson* and *Gurney* and myself, and we have considered it, and are of opinion that the plea is good.

Two reasons were urged on the argument for the validity of the plea: the first, that the rules did not extend to actions of debt, except those on contract; the second, that this plea was given by the statute 21 Jac. 1, c. 4, and therefore that the Judges had no power, by reason of the proviso in sect. 1 of 3 & 4 Will. 4, c. 42, to deprive the subject of the benefit of this plea, and of giving the special matter in evidence under it, whatever they may have intended to do by the rules. The Court, on argument, intimated its opinion upon the first point, but took time to consider the second, and look into the authorities. We

(a) Show. 330.

(b) 2 W. Bl. 1226.

think, after full consideration, that this is a *penal* action, within the 4th clause of the 21 Jac. 1, c. 4, and, consequently, that the Judges had no power to deprive the defendant of the right to plead *nil debet*, or not guilty.

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That section is as follows:—"That if any information, suit, or action, shall be brought or exhibited against any person or persons for any offence committed or to be committed against the form of any penal law, either by or on behalf of the King, or by any other, or on the behalf of the King and any other, it shall be lawful for such defendants to plead the general issue that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter being pleaded, had been a good and sufficient matter in law to have discharged the said defendant or defendants against the said information, suit, or action; and the said matters shall be then as available to him or them, to all intents and purposes, as if he or they had sufficiently pleaded, set forth, or alleged the same matter in bar or discharge of such information, suit, or action.'

There is no doubt, that this case is within the letter of this section, taken by itself.

A penal law is a statute which imposes a penalty, and the statute of Edward 6th does impose a penalty, for it trebles the original duty by way of punishment, thus making the defaulting party liable to a forfeiture beyond the amount of the duty withheld. It is true, that it is an action not *barely penal*, for, on the principle that it is for a duty also such action lies by executors within the equity of the statute, *de bonis exportatis in vitâ testatoris*, *Morton v. Hopkins* (a); and, after a recovery in this action, the plaintiff cannot recover the tithe in any other suit, *Champion v. Hill* (b); nor is it purely penal within the rule

(a) 1 Sid. 407.

(b) Yelv. 63.

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adopted by the Courts as to granting new trials after a verdict for the defendant.

The question then is, whether, by the context, or any judicial exposition of the words of this section, actions of this kind, or any actions for penalties by the party aggrieved, are taken out of the operation of the words according to their ordinary construction.

In the context nothing is to be found which restricts the ordinary meaning of the words of this clause to any particular class of informations. The title (though it is not strictly a part of the act, and is therefore of little weight), is *general*. "An act for the ease of the subject concerning informations upon penal statutes." The recital in the preamble is, "that offences against penal laws may, with more ease and less charge, be commenced and tried in the counties where they are committed, and that the poor commons are grievously molested by troublesome persons commonly called relators, informers, and promoters, by compelling them to appear in his Majesty's Courts at Westminster." This recital applies only to such informations as might be prosecuted either at the assizes or sessions, or in the superior Courts, at the option of the informer; and the first clause removes that particular grievance by restricting such informations to the Courts below; and the third imposes a further check on these informations (namely, such as "by that act are before appointed to be heard and determined in their proper counties"), by requiring the relator to make affidavit that the offence was committed in the county, and within the year. The second section is in its terms general, but it has received a judicial construction, and been held to apply only to the same description of information as before mentioned. See the case of *Barber v. Tilson* (a); and also Mr. Justice Bayley's observations in *Whitehead v. Wynn* (b). Its effect

(a) 3 M. & Sel. 430.

(b) 5 M. & Sel. 427.

is, with respect to such informations, to re-enact the provisions of the 35 Eliz. c. 5, s. 2, with some alteration as to the mode of taking advantage of the objection, and to enforce the laying the venue in the proper county.

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These three sections, therefore, remedy the particular mischief recited. Then comes the section in question, which, instead of confining itself in express terms, like the third section immediately preceding, to the informations before appointed to be tried in their proper counties, uses general language. The words introductory of this (the fourth section) instead of "Be it further enacted" as in the second and third, are "And be it *also* enacted," as if proceeding to a new head. It then goes on "That in any information, action, or suit," (not in any *such* information, &c.) "on any *penal* statute, it shall be lawful for the defendant to plead the general issue, and give the special matter in evidence." Now this section is not, in any mode of construing it, whether as relating only to such suits on penal statutes as are thereafter to be brought in the inferior Courts, or to all suits on such statutes, calculated to remove the particular grievance mentioned in the preamble, viz., that the subject has been vexatiously sued in the superior, when he might have been sued in the inferior Courts, and out of the proper county. The section is, in my view of it, an additional boon to the subject: it goes beyond the grievance recited, but it is within the general object of the act, the ease and relief of persons sued. We see, therefore, no reason in the context contained in the recital for putting a narrow construction on the general words of this clause; and there is no other part of the act which can have that effect. On the other hand, the proviso (the 5th section), which clearly includes some actions in which the remedy was in the superior courts alone, affords an argument,—we do not say a conclusive one (for the proviso may have been inserted for the sake of caution),—but still it affords some argument, that

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some part of the statute was intended to apply to other penal statutes than those in which the remedy was either in the superior or inferior Courts, at the option of the informer; and, if so, the section in question, being in its terms general, may well answer that description.

We think, therefore, that there is nothing in the context which limits the general language of the fourth section, and there is not certainly any judicial exposition of this *section* (though of all the other sections there is (*a*),) which confines it to that class of actions which was capable of being brought either in superior or inferior Courts at the time of the passing of the 21 Jac. 1, or to actions by common informers.

There is, indeed, a dictum of Lord *Mansfield's* in the course of the argument of the case of *Sibly v. Cuming* (*b*), which it is proper to notice. It was an action of debt for bribery on the 2 Geo. 2, c. 24, and the question was, whether, under *nil debet*, the defendant could prove that he was a discoverer under the act, so as to be excused from the penalties. In the course of the argument Mr. *Mansfield* contended that the right to give that evidence did not depend upon the old rules of pleading only, for the act of 21 Jac. 1, c. 4, extended to actions upon subsequent statutes, which Lord *Mansfield* denied. No decision was, however, ultimately given on that point, for the Court held that the defendant was not a discoverer within the meaning of the statute; and Lord *Mansfield's* denial may have been directed to the general proposition that the *whole* of the statute 21 Jac. 1, applied to subsequent statutes, as well as those in force at the time, which it certainly does not, as it has been frequently held that every subsequent statute which imposes a penalty *to be recovered in the superior Courts*, gives a new remedy to which the

(*a*) Lord *Kenyon*, in *Leigh v. Kent*, 3 T. R. 364; 1 Salk. 372, 373.

(*b*) Burr. 2467.

statute of James does not apply: *Hick's case* (a). We are strongly inclined to think that the *fourth section* does apply to all subsequent statutes; probably it was on this ground that the Court of King's Bench intimated their opinion in the case of *Faulkner v. Chevell*, that not guilty was a proper plea; but whether the subsequent statutes be within this clause of the statute or not, the dictum of Lord *Mansfield*, above referred to, does not bear on this question, whether the fourth section applies to all penal actions, or only to penal actions of a particular description.

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It was argued for the plaintiff that at common law, before the statute, not guilty or nil debet were both good pleas to an action of debt for the treble value of tithes: *Langley v. Haynes* (b), *Johns v. Carne* (c), *Wortley v. Herpingham* (d), all prior to the statute 21 Jac. 1, as unquestionably they were, and therefore that the right to plead those pleas was not *given* by the statute in the case of this particular action. That is true, but it is equally true of every other penal action; and, besides, the statute does more than give the right to plead such pleas, for it allows the defendant to give in evidence, under those pleas, any matter which, if pleaded, would have been sufficient in law to discharge the defendant from that information or suit, and every such matter might probably not have been given in evidence under the general issue at common law, as the law was then understood.

For these reasons, which we have given at some length on account of the importance of the case, we think the plea good; but the plaintiff may, if he pleases, withdraw the demurrer, and join issue on payment of costs.

(a) 1 Salk. 372.

(b) Moore, 302.

(c) Cro. Eliz. 621.

(d) Ibid. 766.

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PARKER, executrix, v. SERLE.

In an action on an attorney's bill, to which there was a set-off, the cause being partially heard, was referred to the Master, who was to enter into the whole account. The Master found a balance in favour of the plaintiff of 2*l.* 12*s.*:—*Held*, that the plaintiff was not entitled to costs upon the higher scale without the Judge's certificate.

THIS was an action to recover the amount of an attorney's bill. The defendant pleaded, first, non-assumpsit; secondly, that the work was done by an unqualified person in the name of the attorney; thirdly, payment; and lastly, a set-off. The cause came on for trial before Lord *Denman*, C. J., and was partially heard, when counsel consented to a verdict for the plaintiff upon the two first issues, the bill to be referred for taxation, and the Master to enter into the whole account. The Master allowed the plaintiff's claim, amounting to 122*l.*, and also the defendant's set-off, to the amount of 119*l.* 10*s.*, leaving a balance in favour of the plaintiff of 2*l.* 12*s.* Upon this the master refused to tax the costs upon the higher scale, and a summons for that purpose was taken out before Lord *Denman*, who thought he had no power to interfere.

V. Lee now made a similar motion. The learned Judge has power to certify at any time that this was a proper cause to be tried in the superior Courts. In the "directions to taxing officers, the words tried before a Judge in one of the superior Courts, or Judge of assize," do not mean that the Judge is to hear the whole cause, but that the cause is "brought on for trial": *Nokes v. Fraser* (a), *Broggref v. Hawke* (b).

PARKE, B.—There is no doubt the Chief Justice has power to certify, and without his certificate we cannot grant your application. This Court decided last term, in the case of *Wallen v. Smith* (c), that when a case was referred to an arbitrator who awarded a sum less than 20*l.*, that was a sum *recovered* within the meaning of the directions to taxing officers (d).

(a) Ante, Vol. 3, p. 339.

(b) Ante, Vol. 6, p. 67.

(c) Ibid. p. 103.

(d) See *Savage v. Lipscombe*, ante, Vol. 5, p. 365.

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GOWER v. ELKINS.

THIS was an action for work and labour, goods sold, &c. The writ issued the 1st of September, endorsed for 289*l*. On the 21st of November the plaintiff declared, and on the 19th of December defendant took out a summons to stay proceedings on payment of 150*l*. and costs, in addition to 28*l*. 8*s*. 5*d*., the amount of a set-off. The summons was attended before *Bolland*, B., when the plaintiff refused to accept the 150*l*., alleging more to be due, and the summons was endorsed accordingly. Subsequently the defendant pleaded non-assumpsit and a set-off, but did not pay the 150*l*. into Court. Application had been made to the Master as to the practice, and he stated that the refusal to accept the 150*l*. would make the plaintiff liable for all the costs subsequent to the offer.

Where a summons is taken out to stay proceedings on payment of a certain sum and costs, the refusal to accept that sum will not render the plaintiff liable to the subsequent costs.

But if the sum tendered be afterwards paid into Court, and accepted by the plaintiff, he will be liable to subsequent costs.

Rowe moved for a rule to shew cause why the defendant should not pay into Court the 150*l*., and amend his pleas, or why, in default thereof, the plaintiff should not be free from his liability to pay costs.

PARKE, B.—If a defendant is once ready to pay a given sum, and the plaintiff refuses to receive it, alleging more to be due, and afterwards the defendant pays that sum into Court and the plaintiff takes it out, that is *prima facie* evidence of oppressive conduct, and of an endeavour to make costs; and, unless some explanation be given, the Court will order the defendant to be excused from the intermediate costs and make the plaintiff pay the defendant's costs incurred since the offer. The opinion of the Master has arisen from a misapprehension of an order made in some cases, viz. that unless the plaintiff recovers a certain sum which he has already refused, he must pay costs. In the present case there is no occasion to grant a rule.

Rule refused.

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GERRARD v. ARNOLD.

Where, on reference of an attorney's bill to taxation, the parties agree to waive the delivery of a signed bill, *primâ facie* they waive the operation of the 2 Geo. 2, c. 23, as to payment of the costs of taxation.

IN this case the usual order was made for the taxation of an attorney's bill. More than one-sixth having been taken off on taxation, the attorney was ordered to pay the costs.

Erle moved for a rule to shew cause why the order that the attorney should pay the costs should not be discharged, on the ground that no *signed bill* had been delivered. The Court had no direct power to order an attorney's bill to be taxed independent of 2 Geo. 2, c. 23: *Doe d. Palmer v. Roe* (a); and the mere act of taxation is no consent by the party to waive it: *Howard v. Groom* (b). An unsigned bill referred to the Master is a mere reference to him.

Petersdorff shewed cause upon an affidavit that it was agreed that a signed bill should be dispensed with. [*Parke, B.*—The question is, whether, by waiving the delivery of a signed bill, you do not waive the operation of the statute so far as at it gives an authority to order the attorney to pay the costs. Your affidavit ought to shew that it was the intention that all the provisions of the statute should be adopted; if they intended to waive the statute, *primâ facie* they waived all its consequences.]

PER CURIAM.—The rule must be absolute.

(a) Ante, Vol. 4, p. 95.

(b) Ibid. 21.

1838.

FARWIG v. COCKERTON.

R. V. RICHARDS moved to rescind an order of *Parke*, B., for amending the record in this case, and to set aside the verdict and subsequent proceedings. It was a writ of trial before the Secondary in London, and upon the cause being called on, and before the jury were sworn, the defendant objected that there was a variance between the issue and the record, inasmuch as the latter omitted the date of the writ of summons. The plaintiff insisted upon proceeding with the trial, and obtained a verdict, the defendant conducting his case under protest. On an application being subsequently made to *Parke*, B., he ordered that the record should be amended by inserting the date of the writ of summons. [*Parke*, B.—I made the order for the amendment on the authority of *Cox v. Painter*, in the New Term Reports (a). An incorrect statement of the date of the writ of summons in the writ of trial has been held a sufficient ground for setting aside the verdict; *Wight v. Perrers* (b). So an omission to transcribe into the issue the dates of the pleadings was held to constitute a variance of which the defendant was entitled to avail himself after trial, and after the roll was made up, although the date appeared upon the roll; *Worthington v. Wigley* (c).]

A variance between the issue and the writ of trial may be amended at any time.

LORD ABINGER, C. B.—You are now too late to contend that the trial was irregular. You should have stood upon that objection at the time.

PARKE, B.—I think you should not have the benefit of the trial as well as of the objection. Your proper course would have been not to have appeared. The question is

(a) 1 W. W. & D. 228.

(b) Ante, Vol. 5, p. 463.

(c) Ibid. 209. See *Robinson v. Roland*, ante, p. 271.

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whether there is not a power to amend under the the proviso in the rule. It states "that issues, judgments, and other proceedings in actions commenced by process under 2 Will. 4, c. 89, shall be in the several forms in the schedule hereunto annexed, or to the like effect, mutatis mutandis—Provided that in case of non-compliance the Court or a Judge may give leave to amend (a)." Under this proviso it appeared to me that I might order an amendment at any time.

Rule refused (b).

(a) Ante, Vol. 2, p. 327.

(b) See *Blissett v. Farrant*, C. P. H. T. 1838.

M'GREGOR and Another v. HORSFALL.

M'GREGOR and Another v. SMITH.

Where two actions were brought on policies of insurance by the same plaintiffs against different defendants, the Court refused to make a consolidation rule upon the terms of the plaintiff and the defendant being concluded by the verdict in one action, against the consent of the plaintiff.

THERE were two actions brought by the same plaintiff on two policies of insurance effected with two different companies, of which the defendants were chairmen. After the declaration had been delivered, a summons to consolidate the actions was served on the plaintiffs. The parties attended before *Parke*, B. at chambers, who made the following order—"I do order, that upon submission of the plaintiffs and the last-named defendant, to be bound and concluded by such verdict as shall be found in the first-mentioned action (provided the same shall be to the satisfaction of the Judge before whom the same shall be tried) the defendant in the first-mentioned action admitting his subscription to the policy in question, by his authorised agents named in the declaration, all further proceedings in the last-mentioned action be stayed."

Cresswell having obtained a rule to rescind or amend this order,

Wightman shewed cause.—The plaintiffs state no grounds for wishing to try one action rather than the other, but merely object to being bound by the one fixed upon. *Doyle v. Anderson* (a) will, perhaps, be cited on the other side, but that case must be considered as overruled by *Hollingsworth v. Brodrick* (b). [*Parke, B.*—That case only decided that an order for consolidation can be made without the consent of the plaintiff. Have you any precedent for binding the plaintiff against his consent?] *Hollingsworth v. Brodrick* appears to be an authority on that point.

Cresswell, contra.—The plaintiffs do not object that the actions should be consolidated, but they claim a right to try which they please. This is not the case of ordinary policies, but of two different policies effected with different companies. No instance can be shewn of a consolidation without consent, where there are different policies. In *Doyle v. Anderson*, the Court decided that they could not bind the plaintiff without his consent. *Hollingsworth v. Brodrick* does not shake that decision. The plaintiffs are willing to consolidate upon the following terms:—the plaintiffs to select which action shall be tried, the defendant agreeing to be bound by the verdict in that; the defendants' interests in the policy to be admitted, and if he pays money into Court, money is also to be paid into Court in the other action.

PARKE, B.—Unless the terms that are offered are agreed to in a week, the rule for rescinding the order must be made absolute.

(a) 1 Ad. & El. 635.

(b) 4 Ad. & El. 646.

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ARMITAGE v. GRAND JUNCTION RAILWAY COMPANY.

In an action for running against the plaintiff's carriage, a plea that the damage was the result of the negligence of both parties, is bad in substance, as well as form, for it amounts to the general issue.

THE declaration stated, that at the time of committing the grievances, &c., to wit, &c., the plaintiff was a passenger in and by a certain carriage, forming part of a certain train of railway carriages, then being on a journey on and by a certain railway, to wit, a railway commonly called the Liverpool and Manchester Railway; and the said company was also possessed of a certain other train of railway carriages, then also journeying on and by the said railway, under the care and management of certain servants of the said company, nevertheless, the said company, by their said servants, so carelessly, negligently, and improperly behaved and conducted themselves, in or about the management, controul, and direction of the said train of the said company, that the same, by and through the default, carelessness, negligence, unskilfulness, and improper conduct of the said servants of the said company, there to wit, on the day and year aforesaid, with great force and violence ran upon and against the said train of carriages, in one whereof the plaintiff then was being carried as aforesaid, and struck against the same, by means whereof the said last-mentioned train was then very much injured, and the said carriage in which the plaintiff then was as aforesaid, was driven in, broken to pieces, and destroyed, and thereby the plaintiff suffered a concussion of the brain, and he was otherwise greatly wounded, lacerated, bruised, and injured, &c.

The defendants pleaded, that before and at the time of committing the said grievances in the said declaration alleged, the said train of carriages, in one whereof the plaintiff was a passenger, did not belong to the defendants, nor was the same under the care and management of the defendants, or of the servants of the defendants, but under the care and management of other per-

sons; and the defendants further say, that before and at the time when, &c., in the declaration mentioned, the said train of railway carriages of the said defendants were lawfully proceeding on the said railway, and that the persons who had the management, controul, and direction of the said train of carriages, in one whereof the said plaintiff was then being-carried, carelessly, negligently, and improperly behaved and conducted themselves, in and about the management, controul, and direction, of the last-mentioned train of carriages, and that in part by and through the default, carelessness, or negligence, unskilfulness, or improper conduct of the last-mentioned persons, as well as in part by and through the default, carelessness, &c., by or on the part of the servants of the defendants in and about the management, controul, and direction of the said train, that the said train of carriages of the said defendants ran upon and against the said train of carriages, in one whereof the plaintiff then was being carried, and struck against the same, and occasioned the damage, wounds, lacerations, bruises, and injuries, in the said declaration mentioned, and this the defendants are ready to verify, &c.

Demurrer, assigning for cause that the plea amounts to the plea of not guilty, otherwise the general issue, and is argumentative, and that the allegations therein are respectively averments of evidence, and not of facts; and that the same consists of matter of law, and not of matters of fact, on which any apt or material issue can be taken.

Cowling, in support of the demurrer, was stopped by the Court.

Nevile, in support of the plea.—The rule of law is, that if the mischief is the result of the negligence of both parties, neither can recover against the other. *Vennall v.*

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Garner (a), *Pluckwell v. Wilson (b)*, *Luxford v. Large (c)*, *Vanderplants v. Miller (d)*. The plea is in confession and avoidance; it admits a negligence, and avoids it by shewing that the plaintiff was also guilty of negligence. Although the facts stated might be given in evidence under the plea of not guilty, yet there is no objection to the present plea, inasmuch as it presents to the Court matter of law. Where, in an action for disturbance of common, it was pleaded that A. being seised of such lands, with all commons and emoluments to the premises belonging or therewith used, conveyed them to the defendant, and that the tenants and occupiers of the said lands, &c., had used to have common therein, *virtute ejus*, he having right, and put his cattle in to take common there, and that there was sufficient common both for the plaintiff and himself; although this amounted to the general issue, yet it was held good, as it also disclosed matter of law. *Birch v. Wilson (e)*. The plea would be good as a special verdict, and if so, is not bad on demurrer. The *probable cause* may be specially pleaded to an action for a malicious prosecution, though in effect it amounts to the general issue; *Pain v. Rochester (f)*, *Newton v. Creswick (g)*. Here, the matter of law raised by the plea is, whether negligence on the part of the plaintiff excuses the negligence of the defendant. [Parke, B.—There is no doubt the defence might be given in evidence under the general issue; I am in the constant habit of striking out such pleas at chambers. But I doubt whether the plea is not also bad in substance; it is quite consistent with the facts alleged in the plea that both parties were guilty of negligence, and yet the plaintiff is entitled to recover. Suppose the plaintiff improperly

(a) 1 C. & M. 21.

(b) 5 C. & P. 375.

(c) Ibid. 421.

(d) M. & M. 169.

(e) 2 Mod. 275.

(f) Cro. Eliz. 871.

(g) 3 Mod. 165.

placed his carriage, and the defendant ran against it, though the plaintiff was in fault, yet the defendant would be liable for not avoiding it when he was able to do so. Lord *Abinger*, C. B.—It amounts to this, that if there was negligence on the part of the defendant, and the plaintiff could have avoided the consequences of that negligence by ordinary care on his part, then the injury is not attributable to the defendant.]

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Cowling, contra, was stopped by the Court.

LORD ABINGER, C. B.—I think the plea is bad in substance: there appears to me no question of law arising upon it.

PARKE, B.—I am also of opinion that the plea is bad; every word of it may be true, and still the plaintiff is entitled to recover. The true principle upon which a party is prevented from recovering in a case like the present is stated in *Butterfield v. Forrester* (a), namely—that the accident has occurred by his own default. Where there is a negligence of both parties, the defendant, may, nevertheless, be responsible for the consequences. There may be a want of care on the part of the plaintiff in putting his carriage in a wrong position, yet if the defendant, by want of ordinary care, ran against him, the plaintiff would be entitled to recover. I think this defence was clearly open under the general issue.

Judgment for plaintiff.

(a) 11 East, 60.

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HODGSON v. DOWELL.

In an affidavit to hold to bail in case, for injury to plaintiff's reversionary interest in certain premises, it is sufficient to swear to the amount of damage according to deponent's "*information and belief*," and it is no objection that the affidavit is made by the plaintiff's attorney, and not by a surveyor.

ON the 12th of December, the defendant was arrested for 50*l.*, by order of *Gurney*, B., upon an affidavit made by the plaintiff's attorney, which stated that the said William Dowell did, on or about the 26th day of November last, commence pulling down, taking down, and destroying, and from thence hath proceeded in pulling down, and taking down, and destroying the front and back parts, and the roof and tiling, and many other parts of the said shop, house, and premises, and hath committed great waste and destruction of those premises, already amounting, *as this deponent has been informed and believes*, to 63*l.* 11*s.*, at the least; and the said William Dowell hath carried away the materials and things arising therefrom, and appropriated the same to his own use.

On the 13th of December, application was made to *Parke*, B., at chambers, to rescind the order of *Gurney*, B., and to discharge the defendant out of custody on entering a common appearance, on the ground of the insufficiency of the affidavit. It was objected that the affidavit should have been made by a surveyor, or some person competent to judge of the amount of the damage, and not by the plaintiff's attorney; and also that the amount of damage ought to have been positively sworn to. The learned Judge having refused to interfere,

Hurlstone, on the 13th of January, made a similar application in Court, and obtained a rule, against which

J. L. Adolphus shewed cause, upon an affidavit that the defendant had applied for particulars of the damage, and had demanded a declaration.

The rule of H. T. 2 Will. 4, s. 33, provides that "no application to set aside process or proceedings for irregu-

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larity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity. Here, the defendant, by taking a step in the cause, has waived the alleged irregularity. [*Alderson*, B.—The step taken by the defendant is collateral to the question arising on this motion. The defendant does not seek to set aside any proceedings, but only that he shall try the cause out of prison, instead of in prison. Wherever the setting aside proceedings would set aside a step which the party has himself taken, it is reasonable that that should preclude him. *Parke*, B.—The demand of a declaration is to quicken the plaintiff's proceeding. Have you any authority shewing that to be a waiver?] In *Powell v. Fisher* (a), the taking a step is explained to mean doing anything to recognize previous proceedings as valid. [Lord *Abinger*, C. B.—I have always understood the practice to be in favour of persons in prison. *Parke*, B.—I should be very reluctant to say that asking for particulars is taking such a step in the cause as would preclude a defendant from objecting to the affidavit to hold to bail. The defendant, being in prison, may want to know what the plaintiff is proceeding for.]

Secondly, the affidavit is sufficient; when the damages are unliquidated, it is impossible to swear to the extent of the damage, except by information and belief. A more positive statement is not required, where, from the nature of the question, the party could only have a ground of belief, and could not make a direct assertion; *Hobson v. Campbell* (b). Perjury might be assigned on this affidavit, if the defendant had no reason to believe that such was the amount of damage. If a surveyor had sworn to the amount, he could only have spoken to the best of his knowledge and belief. [*Parke*, B.—It has been decided

(a) Q. B., not yet reported.

(b) 1 H. Bl. 245.

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that the 12 Geo. 1, c. 29, applies only to arrests made by the plaintiff himself, and not to those made under a Judge's order (a).]

Kelly and Hurlstone, contra.—First, the obtaining particulars of the damage is not such a step as to preclude the plaintiff from objecting to the affidavit. It is entirely collateral to the subject of this application, and the demand of a declaration in no respect places the plaintiff in a different situation. Secondly, the affidavit is defective; although the 12 Geo. 1, c. 29, may not be binding on the Judges, yet they have made it the guide of their discretion, and have refused to make orders of this kind, unless satisfied that damage was done to an arrestable amount. Where, from the nature of the case, (as in cases of aggravated assault), no specific damage can be sworn to, the Judge forms his own opinion as to the amount of damage a jury would probably give, but here, the damage might have been clearly ascertained, and positively sworn to. The only cases in which a party is permitted to swear to the best of his knowledge and belief are those of executors and administrators, or the assignees of a bankrupt (b). Here, the affidavit is made by the attorney of the plaintiff, and from any thing that appears, he may never have seen the premises. This statement would not form even a *prima facie* case for a jury.

Lord ABINGER, C. B.—The question is, whether enough is stated in this affidavit to justify the learned Judge in holding the defendant to bail for 50%. The Judges are to exercise their own discretion on such applications; and, looking at the whole affidavit, form their own judgment as to the amount of damage. In the present case, there is no difficulty in forming a probable conjecture as to the

(a) *Omealy v. Newell*, 8 East, 364.

(b) 1 Tidd, 182.

amount of the injury. The declaration states "that the defendant, on the 26th November, commenced pulling down, taking down, and destroying, and from thence hath proceeded in pulling down, and taking down, and destroying the front and back parts, and the roof and tiling, and many other parts of the said shop and premises." It appears to me that the affidavit sufficiently shews that damage has been done to the premises, and deponent states he believes it to amount to 63*l.* 11*s.* The adding that he is informed and believes does not alter the estimate. A surveyor could have said no more: it is only a matter of opinion on inspection of the premises.

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PARKE, B.—I am of the same opinion.

ALDERSON, B.—I think the principle of the case of executors and assignees governs this. The deponent has given as *much* information as he could reasonably be expected to give.

GURNEY, B., concurred.

Rule discharged, with costs.

PURNELL *v.* YOUNG.

TRESPASS for breaking and entering a stable and taking away a horse, and assaulting the plaintiff. Pleas—first, not guilty; secondly, that the said stable was not the stable of the plaintiff; thirdly, as to the breaking and entering the stable, leave and license; fourthly, as to taking the horse, that it was not the plaintiff's; fifthly, as to the assault, son assault demesne.

To trespass for breaking and entering plaintiff's stable, and taking a horse, defendant pleaded not guilty, that the stable was not the plaintiff's, and leave and license. A verdict having

been found for the plaintiff, with one farthing damages, the Judge certified under the 43 Eliz. c. 6:—*Held*, that the plaintiff was entitled to full costs, notwithstanding the Judge's certificate.

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The cause was tried before *Patteson, J.*, at the Monmouth Summer Assizes, 1836, when a verdict was found for the plaintiff, with one farthing damages, on the four first issues, and for the defendant on the last. The learned Judge certified to deprive the plaintiff of costs under the 43 Eliz. c. 6.

A rule nisi having been obtained by *R. V. Richards*, for the Master to tax the plaintiff his costs, notwithstanding the Judge's certificate,

Maule shewed cause.—The question turns upon the construction of the 43 Eliz. c. 6, s. 2, and the 22 and 23 Car. 2, c. 9, s. 136. The statute of Elizabeth enacts, “that if upon any action personal to be brought in any of her Majesty's Courts at Westminster, *not being for any title or interest of lands*, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the Judges of the same Court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same Court shall not amount to the sum of forty shillings, or above, that in every such case the Judges and Justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretion.” The statute of Charles enacts, that in all actions of trespass, assault, and battery, and other personal actions, wherein the Judge at the trial of the cause shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration, was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit

than the damages so found shall amount unto." So far back as the case of *Clegg v. Molyneux* (a), there appears to have been a difficulty in the construction of the latter act, and Lord *Mansfield*, in delivering judgment, says:—"There is a puzzle and perplexity in the cases on this part of the statute, and a jumble in the reports." [*Parke*, B.—Here the plea of leave and licence takes the case out of the statute of Charles; there are numerous cases to that effect, and we feel bound by them: so long as I have been in the profession that point has been considered as settled.] Those cases proceeded upon the ground that where an interest in land could not, by any possibility, come in question, the statute was inapplicable; but the early decisions which put that construction upon the statute took place before the 4 Anne, c. 16, which allows several matters to be pleaded, and therefore, at that time, under the plea of leave and licence, the freehold could not come in question, as no other matter could have been pleaded. The 4 Anne, c. 16, by allowing several matters to be pleaded, has altogether altered the law. Suppose the case of a double plea, that defendant was not guilty, and that plaintiff was not possessed of the stable, and that such plea was not demurred to; it would be the same in effect as the pleas of not guilty and not possessed. Formerly, not guilty and a justification were not allowed to be pleaded together: *Barnett v. Greaves* (b). One of the earliest decisions on the statute of Charles is the case of *Asser v. Finch* (c), which was trespass for entering a close, the defendant justified for a way there, and the plaintiff replied extra viam, and issue thereupon, and the plaintiff obtained a verdict. And whether the plaintiff should have full costs, or no more costs than damages, was the question; for, it was said, no title came in question upon the trial, for the way is admitted, and the issue is now

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(a) 2 Doug. 779.

(b) Barnes, 339.

(c) 2 Levinz, 234.

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only whether he was guilty extra viam; sed per curiam. "The plaintiff shall have full costs; for, first, there was a title to the way in question upon record, and so the case is out of the intent of the statute. Secondly upon this issue, extra viam, a title to the way is in question, scil. of what extent the way is." [*Parke, B.*—Is there not a case as to the construction of the statute of Charles since the 4 Anne?] From the judgment of *Coleridge, J.*, in *Smith v. Edwards* (a), it must be assumed that the plea of not guilty is now a special plea. In an action of assumpsit or debt, when the subject-matter of the action is an interest in land, if that appeared upon the record, the judge would not certify; but if it did not appear, he must certify to deprive the plaintiff of costs. The statute of Elizabeth looks to the subject-matter of the action, and not to the form of it. In *Wright v. Nuttall* (b) Lord *Tenderden* says, "the statute in question, (43 Eliz. c. 6), ought to receive a liberal construction, so as to prevent the bringing of actions in the superior Courts for small sums. Where less than 40s. is recovered the plaintiff cannot possibly derive any benefit from a suit in a superior Court, and such actions can only be brought for the benefit of the professional persons employed to conduct them." Where, in an action of trespass quare clausum fregit, an issue was raised on a plea of licence, and a verdict found for the plaintiff with 1d. damages, it was held that the judge might certify under the 43 Eliz.: *Howard v. Cheshyre* (c). In an action on the case for injury done to the plaintiff's right of common by digging turves, there, the judge may certify under the 43 Eliz. c. 6, for the interest or title of the land does not necessarily come in question: *Edmonson v. Edmonson* (d). [*Parke, B.*—The difficulty under the statute of Elizabeth is, that upon this issue the title must necessa-

(a) Ante, Vol. 4, p. 621.

(b) 10 B. & C. 499.

(c) 1 Lord Kenyon, 245.

(d) 8 East, 294.

rily come in question. It appears from the case of *Peddell v. Kiddell* (a), that where there was a special plea of justification, the plaintiff was entitled to full costs, though the damages were under 40s.] *Wiffin v. Kincard* (b), shews that the issue may be taken distributively. There, the judge certified with respect to the imprisonment under the 43 Eliz., and refused to certify under the 22 & 23 Car. 2, to give the plaintiff full costs for the assault and battery. So, where in an action for assault and battery, there was a separate count for false imprisonment, and the judge certified under the 43 Eliz., the Court refused to tax the plaintiff's costs: *Briggs v. Bowgin* (c). The rule is, that wherever the freehold necessarily comes in question, then the judge cannot certify: *Littlewood v. Wilkinson* (d). *Wright v. Piggin* (e) will perhaps be cited on the other side. That was an action of trespass quare clausum fregit, with a count de bonis asportatis, the defendant pleaded the general issue, and accord and satisfaction. The question at the trial was, whether a term of years had expired, and the jury having found a verdict for less than 40s., it was held the plaintiff was entitled to full costs. Other authorities are collected in 1 Saund. 300, n. f. In *Dunnage v. Kemble* (f), which was an action of trespass for breaking and entering the plaintiff's dwelling-house, the defendant pleaded not guilty, and an entry to make a distress for rent in arrear. A verdict was found for the plaintiff on the first issue, with one farthing damages, and for the defendant on the second, and it was held that the plaintiff was not entitled to costs without a certificate. In that case the freehold might have come in question. The plea of licence brings the case within the statute of Elizabeth.

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(a) 7 T. R. 659.

(b) 2 N. Rep. 471.

(c) 2 Bing. 333.

(d) 9 Price, 314.

(e) 2 Y. & J. 544.

(f) 3 Bing. N. C. 528.

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R. V. Richards, contra.—The question is, whether the Court can distribute the pleadings between the two statutes. If the plea of license alone had been pleaded, that would have taken the case out of the operation of the statute of Charles. A plea that the plaintiff “was not possessed,” must have the same effect as a plea of *liberum tenementum*. This question was considered in *Littlegood v. Wilkinson*, which was an action for digging a ditch and cutting down a tree, with a count on an *asportavit*. The defendant pleaded not guilty and *liberum tenementum*. The question at the trial was, whether the tree which had been cut down grew upon the plaintiff’s or the defendant’s ground. The plaintiff having obtained a verdict for less than 40*s.* it was held that he was entitled to full costs; for, although the title to the freehold did not in fact come in question, it might on the record so framed. In *Wiffen v. Kincard* there does not appear to have been a distribution of the pleas between the two statutes, for it would seem the general issue alone was pleaded. *Smith v. Edwards* is no authority that the pleas may be taken distributively.

Cur. adv. vult.

PARKE, B.—A motion was made in this case some time ago for the Master to tax full costs to the plaintiff, notwithstanding the Judge’s certificate to deprive him of costs under the statute of 43 Elizabeth. Cause was shewn, and most of the cases bearing on the subject were cited. We who heard the argument, my Brothers *Bolland*, *Alderson*, and *Gurney*, and myself, have considered it, and are of opinion that the rule ought to be made absolute.

It was an action of trespass for breaking and entering a stable, and taking a horse, and assaulting the plaintiff. There were several pleas: 1st, not guilty; 2ndly, that the stable was not the plaintiff’s; 3rdly, leave and license as to the breaking and entering; 4thly, as to taking the horse,

that it was not the plaintiff's; 5thly, to the assault, son assault demesne. The issues on the four first pleas were found for the plaintiff, with one farthing damages, and that on the last for the defendant, and the learned Judge certified to deprive the plaintiff of costs.

It was contended, on the part of the defendant, that the judge might certify under the statute of Elizabeth, because the action was not "concerning any title or interest in lands." For the plaintiff, it was insisted that it was.

If there had been nothing but the general issue and license pleaded, and the case had occurred before the new rules, the Judge might have so certified, unless it appeared upon the evidence upon the general issue *on the trial* (a), that the title had come in question, which might have been the case on that plea (independently of any statutory provision), because it was a denial that the defendant had trespassed on the *plaintiff's* close, and put in issue the fact that *it was his close*, as well as the fact that the defendant had entered it. Of that title, possession would be *prima facie* evidence against all, and it would *constitute a good title against a wrong doer*, and none against the person lawfully entitled to the possession, who, though the plaintiff had the actual possession, might have shewn that he (the defendant) was lawfully entitled to it. The plea of not guilty, however, did not *necessarily* raise a question of title, for the defendant might not really have contested it, and had no other mode of disputing the fact of the trespass than by pleading not guilty. The real nature of the question on the trial would therefore govern the certificate, as it did in *Wright v. Piggin*, where the point in dispute was, whether a term had ended or not; but the plea denying *the close to be the plaintiff's* since the new rules, is a denial of the *plaintiff's title to the close*, to the

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same extent that he would have been obliged to prove it before under the general issue (a), that is, it is a denial of possession, if the defendant was a *wrong doer*, if otherwise, of the right of the possession; but in either supposition, it is necessarily a denial of title: for even in the former case, possession is title against a wrong doer, and therefore the plea raises a question of title in the action, and prevents the Judge from certifying.

It was then contended, that the statute 22 & 23 Car. 2, c. 9, applied to the case, and that the plaintiff would not be entitled to any more costs than damages, without a Judge's certificate, for on those pleadings the "freehold or title might have come in issue," either on the plea of not guilty (as it certainly might by 11 Geo. 2, c. 19, s. 21), or on the plea that the stable was not the plaintiff's; and it was said that he ought not to have full costs, unless the pleadings upon the *whole record* excluded the possibility of the title coming in question. It was said, that most of the cases in which it had been held that a special plea of license, or the like, which shews that title could not come in question, and therefore prevents the operation of the statute, had arisen before the statute of 4 Anne, c. 16, allowing double pleading, and therefore do not apply to a case in which there are several pleas. And if the matter were *res integra*, it would seem not unreasonable so to hold; but the weight of authority is so very great, in many cases since the statute of Anne, wherever there is a special plea (which excludes all questions of title) found against the defendant, the plaintiff is entitled to full costs, that it is impossible now to decide otherwise. In *Peddell v. Kiddle* (b), the question was considered as finally concluded, and Lord *Kenyon* said, it would be dangerous to

(a) *Heath v. Milward*, 2 Bing. Dowl. P. C. 621.
 N. C. 106; *Smith v. Edwards*, 4 (b) 7 T. R. 659.

allow any innovations to be made on a point so thoroughly settled. It will henceforth be prudent for defendants in actions of trespass, of a trifling nature, to abstain from denying that the locus in quo is the plaintiff's.

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Rule absolute.

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ASSUMPSIT for goods sold and delivered, and on an account stated. Plea, as to the sum of 18s. 6d. parcel, &c., actionem non, because the goods, the price and value whereof amounted to the sum of 18s. 6d. parcel of the money in the first count mentioned at the time of the sale and delivery thereof, consisted of certain wines and goods, to wit, two bottles of port, &c., and that the plaintiff, before and at the time of the sale and delivery thereof, carried on the trade and business of a wine merchant, and the said goods were so sold and delivered by the plaintiff to the defendant, on Sunday the 1st day of March, 1835, and in the way of the plaintiff's said trade and business, and in his ordinary calling of a wine merchant; and the said promise to pay the price and value thereof was made on that day by the defendant to the plaintiff in the way of the plaintiff's said trade and business, &c., upon the said Sunday, such sale or delivery not being a work of necessity or of charity, and contrary to the statute, &c.: and that the sum of 18s. 6d., parcel of the money in the last count mentioned, as found to be due from the defendant to the plaintiff, and an account whereof was so stated as aforesaid was so found to be due, and was and is the said sum of 18s. 6d. in which the defendant is supposed to be indebted to the plaintiff, for and in respect of the said goods so sold and delivered on a Sunday as aforesaid.

Verification.

To indebitatus assumpsit for goods sold and delivered, and on an account stated, the defendant pleaded as to 18s. 6d., parcel, that they were sold on a Sunday, in the way of the plaintiff's trade and business. Replication, that although the goods were sold at the time, and in the manner stated, still that the defendant kept and detained the same without offering to return them, whereby he became liable to pay for them on a quantum valebant. On demurrer to the replication, it was held bad, on the ground that it ought to have shewn a new promise to pay after the retaining of the goods by the defendant.

Replication as to so much of the plea as relates to the said sum of 18s. 6d. parcel of the money in the first count

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mentioned *precludi non*, because, although the said goods were sold and delivered by the plaintiff to the defendant at the time, and in the manner, in the plea alleged; yet the defendant, after the sale and delivery of the said goods, kept and retained the same, and hath ever since kept and retained the same, for his own use and benefit, without, in any manner, returning or offering to return the same to the plaintiff, and thereby hath become liable to pay to the plaintiff the said sum of 18*s.* 6*d.*, the same being so much as the said goods were and are reasonably worth: and as to so much and such part of the plea as relates to the said sum of 18*s.* 6*d.*, parcel of the said sum of money in the second count mentioned *precludi non*, because, although the said sum of 18*s.* 6*d.* was found to be due from the defendant to the plaintiff upon an account stated between them as by the defendant in that behalf alleged; yet that the said account, in the second count of the declaration mentioned, was stated between the plaintiff and the defendant upon a different and subsequent day, to wit, upon the 25th day of April, 1835, the same not being the Lord's Day, or Sunday, and upon that accounting the defendant was then found to be indebted to the plaintiff, and in consideration thereof, then promised the plaintiff to pay him the said sum of 18*s.* 6*d.*, parcel of the monies in the second count of the declaration mentioned as aforesaid, in manner and form as the plaintiff hath in his declaration in that behalf alleged, &c.

Special demurrer to the replication to so much of the plea as related to the said sum of 18*s.* 6*d.*, parcel of the monies in the first count mentioned, assigning for causes that the replication neither traversed or denied, nor confessed or avoided, the matters in the plea alleged, and that the plaintiff had not stated or shewn that the defendant made a *fresh promise* to pay the plaintiff the said sum of 18*s.* 6*d.*, and that the matters pleaded in the replication might and ought to have been pleaded by a formal traverse

of the sale and delivery having taken place on a Sunday, and that the replication was a departure from the first count of the declaration; and to have enabled the plaintiff to have recovered on the matters contained therein, he ought to have declared specially.

To the replication so far as it related to the 18s. 6d. pleaded to as part of the monies mentioned in the second count of the declaration, the defendant rejoined, denying that the account was stated on a different or subsequent day to the Sunday on which the goods were sold and delivered, as in the plea mentioned.

Martin, in support of the demurrer.—The replication is bad; the proper course would have been for the plaintiff to have alleged a new promise, instead of stating such new promise in his replication. The case of *Williams v. Paul* (a) will, doubtless, be relied upon on the other side; it is, however, distinguishable from the present. In that case the defendant had purchased three cows and a heifer on a Sunday, to be paid for in three months. He afterwards objected to pay for the heifer, alleging that it was not the one he had chosen. The beast, however, remained with him, and some time afterwards, upon being applied to for the price, the defendant said he would pay when the time agreed on was up. The case of *Read v. Rann* (b) explains the proper mode of proceeding in a case like the present, and the legal inferences from which the promise will be implied in such a case. *Parke, J.*, says, "The custom supposes a special contract between the parties, and if that is not satisfied, no claim at all arises, for no other contract can be implied. In some cases a special contract, not executed, may give rise to a claim in the nature of a quantum meruit ex. gr., where a contract has been made for goods, and goods sent not according

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(a) 6 Bing. 653.

(b) 10 B. & C. 441.

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to the contract are retained by the party; there, a claim for the value on a quantum valebant may be supported, but then, from the circumstances, a new contract may be implied." This shews clearly that the proper course for the plaintiff would have been a new assignment, and that the present replication is a departure.

Curzon, contra.—This is no departure; there is nothing in the replication inconsistent with the declaration.

PARKE, B.—The real question is, whether your replication is good in substance; adverting to this view of the case, the plaintiff no doubt relies on *Williams v. Paul*.

LORD ABINGER, C. B.—There is another difficulty in the plaintiff's case, viz., that the goods might have been consumed; he ought to shew the defendant has it in his power to return the goods.

PARKE, B.—The replication ought to have stated the legal result of the facts, and not the facts themselves: in other words, the replication ought to have averred that he retained the goods, and afterwards promised to pay; no promise is shewn subsequent to the statement of the account, even supposing the decision in the Common Pleas correct, and that where a party keeps goods sold under an illegal contract, a new promise may make him liable. In *Williams v. Paul* the Court proceeded upon evidence of an express promise after the retainer, and, for want of it here, the replication is bad.

BOLLAND and GURNEY, Bs. concurred.

Judgment for plaintiff.

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EDMUNDS v. KEATS.

BARSTOW opposed the justification of bail. The objection was, that the bail had sworn that they were worth property to the amount of 100*l.* "over and above all their just debts," instead of "over and above what will pay all their just debts," as required by 1 Reg. Gen. H. T. 2 Will. 4, s. 19(a). He referred to *Miller's bail* (b).

Bail must swear they are worth the required amount over and above *what will pay all* their just debts.

Thomas, in support of the bail, relied on the previous rule of H. T. 1 Will. 4, and cited *Hunt's bail* (c).

PARKE, B.—The terms of the latter rule must be complied with, and consequently the affidavit is insufficient.

Rejected.

(a) Ante, Vol. 1, p. 185.

(b) Ante, Vol. 5, 602.

(c) Ante, Vol. 4, p. 272.

WRIGHTSON v. BYWATER and Others.

THIS was an action of trespass, which was referred by an order of Nisi Prius to an arbitrator, who was to determine all matters of difference between the parties at law and in equity, so as the said arbitrator should make and publish his award in writing, concerning the premises ready to be delivered to the parties) or, *if either of them should be dead before the making* of the award, to their

A cause was referred to an arbitrator, who was to settle all matters in difference between the parties at law and in equity, so that he made his award by a certain day (with power of en-

largement), to be delivered to the parties, or if either of them should be dead, to their personal representatives. The arbitrator was to be at liberty to make *one or more awards at his discretion*. At the time of the submission, two equity suits were pending, in which the parties to the action, and also certain infants, were concerned. Before any award was made, one of the parties to the equity suits died.

The arbitrator by his award ordered a verdict to be entered for the plaintiff, damages 500*l.*, and also that the defendants should pay to the plaintiff 350*l.*, *for grievances not included* in his declaration:—*Held*, first, that the award was sufficiently final, although it did not dispose of the equity suits; secondly, that the circumstance of infants being parties to those suits did not invalidate it; thirdly, that the arbitrator's authority was not revoked by the death of one of the parties; and, lastly, that the award of 350*l.* was sufficiently certain.

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respective personal representatives, who should require the same on or before the first day of Michaelmas Term then next. Power was given to the arbitrator to enlarge the time for making the award from time to time, as occasion *should* require, and the arbitrator was to be at liberty *to make one or more awards, at his discretion*. At the time of the submission, two suits in equity were pending, in which the parties in this cause were concerned, and in which certain infants were interested, and there were also other matters in difference between them. When the first meeting before the arbitrator took place, the defendants' counsel being absent, application was made to postpone the reference, which was agreed to by the arbitrator on condition that they should deposit with a banker 750*l.*, to abide the event of the award, which was accordingly done. The time for making the award was duly enlarged at different intervals, until the first day of Michaelmas Term, 1836. In the mean time a plaintiff in one of the equity suits, Thomas Linaker, died. On the 17th of June, 1836, the arbitrator made his award, whereby, after reciting the order of reference, he ordered and directed that a verdict should be entered for the plaintiff upon all the issues, with 500*l.* damages: he further ordered, that the defendants should pay or cause to be paid to the plaintiff the sum of 500*l.*, as well as the further sum of 350*l.* which was awarded to be paid by the defendants to the plaintiff as damages, *for grievances not included in the plaintiff's declaration*. In Michaelmas Term, 1836, a rule was obtained for setting aside the award, on the ground that it was not final, as not having disposed of the suits in equity; that the infant parties to those suits were not bound by the submission; that it was revoked by the death of Linaker; and that the award *for other grievances* was not sufficiently certain. That rule, however, was discharged; and judgment having afterwards been entered up on the award, and execution sued out for the balance beyond

the 730*l.*, a rule nisi was obtained for setting those proceedings aside, against which

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Goulburn, Serjt., and *Humfrey* shewed cause.—The arbitrator having express power to make one or more awards, this award is sufficient, although the equity suits are not disposed of. So, with respect to the objection, that there are infant parties to the suits. The object of the provision has been to meet these difficulties. The clause providing for the delivery of the award to the personal representatives, prevented the death of Linaker from operating as a revocation of the arbitrator's authority: *Clarke v. Crofts* (a). The award of 350*l.* is sufficiently specific.

Sir *W. Follett* and *Hoggins* contra.—By the terms of the submission the arbitrator is to determine the suits in equity, as well as that at law, before the first day of Michaelmas Term then next. He cannot now make any further award, as the time has not been enlarged for that purpose. If this award be held good, he might have awarded on any one matter in difference, however minute, between some of the parties, omitting the rest. It was clearly the object of the parties, that all matters in difference should be awarded upon the determination of the suits in equity, which might have rendered unnecessary that part of the award relating to the 350*l.* An award is not final, unless it determine all matters in difference which are referred: *In the Matter of Tribe* (b). Besides, the submission was not mutual, because the infants were not bound: *Biddell v. Douse* (c). The submission must be such as to enable the arbitrator to decide on all matters in difference, or the award cannot be binding: *Pearse v.*

(a) 4 Bing. 143.

(b) 3 A. & E. 295.

(c) 6 B. & C. 255.

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Pearse (a), Marsh v. Wood (b), Hayward v. Phillips (c). The authority of the arbitrator was revoked by the death of Linaker. The clause for the delivery of the award to the personal representatives does not obviate the objection. An executor could not be compelled to perform the award, if it were against him. In *Marsh v. Wood (d)*, Lord *Tenterden*, C. J., says, "If by matter ex post facto, a submission becomes ineffectual as to one party, it must be altogether void." Then, the award of 350*l.* for other grievances, without stating what they are, is uncertain. [*Parke*, B.—The Court have no doubt upon that point. The award as to this part is between the plaintiff and defendants in the action only, and it would appear by part of the evidence before the arbitrator, what the grievances were. *Id certum est, quod certum reddi potest.*]

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This was an application to the Court to set aside a judgment entered up pursuant to an award on a submission by rule of Court, and a fi. fa. thereon, and for a return of a part of the money deposited with the sheriff upon the execution of the fi. fa. The case has been several times before the Court in its earlier stages, and last of all upon a motion to set aside the award, which the Court refused, the majority intimating a strong opinion that it was good, but deciding merely, on that occasion, that it ought not to be set aside; but the parties were left to contest its validity, when that necessarily would come in question. On this application, to set aside the judgment and execution, we must determine the validity of the

(a) 9 B. & C. 484.

(b) Ibid. 659.

(c) 1 Nev. & P. 288.

(d) 9 B. & C. 664.

award, for there is no other way than by this motion in which the defendants can contest the legality of that judgment and execution. We are of opinion, that, under the circumstances of this case, the award is good.

It appears, from the affidavits, that this action stood for trial at the Summer Assizes 1835, that besides the subject of it, there were other matters in dispute between the parties to the action; and there were also pending two suits in Equity, *Linaker v. Lacey*, and *Lacey v. Lacey*, in which suits infants were concerned; but who were the parties to these suits (except that one Thomas Linaker was a plaintiff in one), or in what way those suits were connected with the subject of the action does not appear; and, therefore, we cannot assume them to have any connection except so far as appears by the submission to the reference hereinafter mentioned. When the cause came on for trial, an order of reference was made, of which this is the substance, (his Lordship stated the order). Soon after this, the defendants deposited 730*l.* to abide the reference, and, by their attorney, attended the prior and subsequent meetings. On the 27th December, 1835, Linaker died.

On the 17th June, 1836, the arbitrator made his award (his Lordship read the award). After this award, the 730*l.* was received by the plaintiff, and judgment was signed and execution issued for the balance awarded, and costs.

The objections to the award were; first, that it was not *final*, because the Chancery suits were not disposed of. Secondly, that the submission was not *mutual*, because infants were parties, and were not bound, could not be. Thirdly, that it was revoked by the death of Linaker, one of the parties. Fourthly, that it was void as to the 350*l.* awarded for other grievances, as not being sufficiently certain. The last of these objections was disposed of during the argument, and it is unnecessary to say anything more upon that.

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With respect to the other three, the first is wholly founded on the assumption, that in order to make the award valid, it is necessary that every matter in difference should be decided by it, and if that assumption is incorrect, the objection fails. The other two depend *mainly*, but not *entirely*, on the same assumption. The death of Linaker affects only the authority to determine that suit in which he was a party, and, therefore, even supposing, that notwithstanding the clause in the submission providing for the death of any party, the power to award on that suit is revoked, yet if an award upon that suit be not essential to the validity of the award on other matters, the award may nevertheless be good. So in like manner, if the determination of those matters in which the infants have an interest, be not necessary to the decision of those in which they have none, the want of such decision would be immaterial. If it be said, that it was a part of the consideration for the defendant's promise to refer the suits and the actions, that the arbitrator should have a *continuing power* to decide all the suits, the answer is, that such was not the case, for all the parties contemplated that the reference should go on notwithstanding the death of a party, of which the express provision, binding the executors, is a proof whether that provision would be effectual or not to make an award in that particular suit valid. So, if it be argued, that the agreement on the behalf of all the parties to all the suits, to give the arbitrator power to decide, was also a part of that consideration, and that the want of a binding consent of the infant parties caused the failure of the consideration, the answer is, that all parties well knew that there were infant parties, and as they must be presumed to know the law, they knew *they* were not bound by the attorney's consent on their behalf, and, therefore, they had all the consideration which they had stipulated for, and the consent of those parties who could and did consent was a sufficient consideration in point of law for their promise.

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The question, therefore, is reduced to this; whether, under this reference, it is necessary to the validity of any award to be made pursuant to it, that it should decide all the matters in dispute. And this is a mere question of construction, for there is no rule of law requiring it; its necessity arises from the contract of the parties. The old rule was, that unless the submission expressly made it conditional with an "ita quod," an award of part only was good. This was laid down by Lord Coke in *Ormelade v. Coke* (a), and it was so held in *Dyer*, 242, b. *Baspole's case* (b), and many other cases. In more modern cases it has been said, that an *express* condition is not required, for in *Bradford v. Bryan* (c), Willes, C. J., says, "I am willing to carry it as far as it has been carried already, because, were it not for the cases, I should be of opinion that when all matters are submitted, though *without such condition*, all matters must be determined, because it was plainly not the intent of the parties that some matters only should be determined, and that they should be at liberty to go to law for the rest." But beyond this, the cases have not gone, and it is still the question, whether the parties intended all to be decided. In *Simmonds v. Swaine* (d), Chamber, J., says, "A great deal of nicety prevailed in the old cases respecting awards, but the rigour of that interpretation has for a long time been gradually relaxing, and the Courts are now come to a mode of considering them more consonant to common sense; but even in the earlier cases, so long since as in Rolle's Abridgment Arbitrament, L., it was in some cases held, that unless there was a clause ita quod fiat de præmissis, it was sufficient to make the award good that one point was decided, provided that it was not necessary, in order to make the award just, that the others should be decided also. In the case of *Payne v. Cook*, adjudged many years since in

(a) Cro. Jac. 355.

(c) Willes, 270.

(b) 8 Coke, 98.

(d) 1 Taunt. 554.

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the Exchequer Chamber, many points relating to awards were decided on, and amongst others, this general doctrine was strongly laid down, that as there was no clause in the submission providing that the award should be made on all points submitted, if the matters omitted were not necessarily dependent on, and connected with the other points, the award should be sustained.

The point to be decided then is, whether this submission requires the award to be made of all matters in dispute. In ascertaining its meaning every part is to be construed together, and when we find a clause that the arbitrator is to have power to make "*one or more awards* at his discretion," we cannot doubt but that the arbitrator might make a valid award on one entire subject of dispute. For it cannot be supposed that such separate awards, when made, were not intended to be binding from the time they were made; it is impossible to imagine they were to be ambulatory till the last was made; and the case is very different from that of a reference with power to regulate the intermediate enjoyment, or to give directions respecting the intermediate management of some subject of dispute, which, from their very nature, are meant to have a temporary operation only. This is a provision that the arbitrator may make one or more final awards.

We, therefore, think that in this case the parties have given the *power* to the arbitrator to dispose of all matters, but have not made it a *condition* that all matters should be disposed of by him.

The only case which it is necessary to consider as opposed to this view of the question is that of *Biddell v. Douse*, where, in fact, there was a similar clause in the agreement of reference. But it is quite enough to say that this point was never argued or considered in the Court of King's Bench, and we cannot take the judgment as a binding authority upon a point which was never brought before the Court. The rule, therefore, will be discharged.

Rule discharged.

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EVANS v. BARNARD.

ADDISON moved for judgment as in case of a nonsuit. Issue was joined on the 14th April last; it was a country cause, and no notice of trial had been given. From a recent decision in this Court (*a*), it became necessary to consider whether the application was too early. The 14 Geo. 2, c. 17 enacted, that where issue was joined, and the plaintiff neglected to bring such issue on to be tried, *according to the course and practice of the said Courts respectively*, it should be lawful for the Judges of the said Courts at any time after such neglect, to give the like judgment for the defendants as in case of a nonsuit. [*Parke, B.*—The new rule which dispenses with an entry of the issue previously to moving for judgment as in case of a nonsuit, makes no difference as to the time of moving.] The question will depend upon when it was necessary, under the old practice, to enter the issue. In *Tidd's Practice* (*b*), it is stated “that in the King's Bench, if the action be laid in London or Middlesex, the defendant ought not to give a rule for the plaintiff to enter his issue the same term it is joined, unless notice of trial has been given. In the Common Pleas, when the action is laid in London or Middlesex, the defendant can in no case give a rule to enter the issue the same term it is joined, but must stay until the next term. And in a *country cause* the plaintiff is in no ways bound in either Court to enter his issue the same term. In the Exchequer it is said a defendant may give a rule for the plaintiff to enter his issue the same term in which it is joined, whether notice of trial has been given or not.” In the present case the practice of the Court required the plaintiff to enter the issue before the end of Trinity Term, and to proceed to

When issue was joined in a country cause on the day before Easter Term, and no notice of trial had been given: —*Held*, that the defendant might move for judgment as in case of a nonsuit, after one assize had elapsed.

But, where in such case issue is joined in Trinity Term, the motion cannot be made until the following Easter Term.

(*a*) *Smith v. Miller*, ante, p. 154.

(*b*) Page 727.

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trial at the assizes after. In *Robinson v. Taylor* (a), which was a country cause, issue was joined in Easter vacation, and no notice of trial had been given; and *Littledale, J.* after consideration, held that the plaintiff should have proceeded to trial at the Summer Assizes. The same rule is laid down in *Williams v. Edwards* (b), and *Smith v. Rigby* (c). The only case that militates against these decisions is, that of *Smith v. Miller*, in which the Court held, that in a country cause where there has been no notice of trial, two assizes must elapse before the defendant can move for judgment as in case of a nonsuit.

PARKE, B.—That case was decided upon the information of one of the officers of the Court, who appears to have been under a mistake. You have satisfied me that there ought to be a rule nisi.

Busby, on a subsequent day shewed cause, and referred to *Smith v. Miller* and *Crowley v. Dean* (d).

LORD ABINGER, C. B.—If issue be joined in an issuable term, the rule as to two assizes will apply, but not otherwise.

PARKE, B.—If issue be joined in the term next before the assizes, then two assizes must elapse before the motion can be made, so that if issue be joined in Trinity Term, the defendant cannot move until the following Easter Term.

Rule discharged upon a peremptory undertaking.

(a) Ante, Vol. 5, p. 518.
 (b) Ante, Vol. 3, p. 183.

(c) Ante, Vol. 3, p. 705.
 (d) 1 C. & J. 18.

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JONES v. EDWARDS.

THIS was an action for penalties for acting as a magistrate, without being duly qualified. The declaration was delivered on the 26th of October, and on the 4th of November the defendant pleaded the general issue. On the 8th of November the issue was delivered, with notice of trial for the second sittings in Michaelmas Term. The venue having been improperly laid in Middlesex instead of Merionethshire, the notice of trial was countermanded on the 10th of November; and on the 13th a summons was taken out to amend the declaration accordingly, which was allowed upon payment of costs, with liberty for the defendant to plead de novo. On the 22d of November the defendant specially demurred to the declaration, assigning for cause, that though it was alleged that the defendant acted as a justice of the peace, it did not appear what acts he had done. On the 28th of November the plaintiff obtained a week's time to join in demurrer, and further time was afterwards obtained; and on the 11th of December a summons was taken out before *Gurney*, B. at Chambers, to amend the declaration, which application was refused.

A similar rule having been obtained by *Jervis*,

Cresswell shewed cause.—Upon an affidavit of the defendant that he was satisfied that he had a good qualification, and that the plaintiff was a person in insolvent circumstances, and wholly unable to pay the costs if he failed. Besides, it was contrary to the practice of the Court to allow an amendment in a penal action. [*Parke*, B.—In *Tidd's Practice*, p. 711, it is said there is no difference in civil or penal actions. The only class of cases in which amendments are not allowed is in real actions.] There is a difference between a party suing in his own right, and

The Court will allow amendments as well in penal as in civil actions, unless delay is caused thereby.

Where in a penal action, it was sworn that the plaintiff was insolvent, the Court refused to make it a condition of amendment that the plaintiff should give security for costs.

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as a common informer. The law allows less favour to a common informer ; he must bring his action within a certain time, and must lay the venue at a particular place. In *Matthews v. Swift* (a), which was a penal action for practising as an attorney, without being duly enrolled, the Court refused to allow the plaintiff to amend. So in *Wright v. Ager* (b), which was an action against the sheriff under the 32 Geo. 2, c. 28, for extortion, the Court would not allow the declaration to be amended by inserting new counts on the 26 Hen. 6, c. 22 ; at all events, if the amendment is allowed, it should be on the terms of the plaintiff giving security for costs.

Jervis, in support of the rule.—*Matthews v. Swift* was decided on the ground that the plaintiff was not entitled to indulgence, because he had caused delay ; here, the venue being changed, the cause cannot be tried before the next assizes.

PARKE, B.—I concur in the rule acted upon in other cases, namely, that it is competent for the plaintiff to amend in a penal action, unless under very special circumstances, one of which may be, that delay is necessarily caused thereby. In the present case the amendment ought to be allowed, with liberty for the defendant to plead de novo, the plaintiff undertaking to go to trial at the next assizes. If there had been any precedent for requiring security for costs in such a case, I might have imposed those terms, but in the absence of any precedent I am unwilling to make one.

Rule absolute accordingly.

(a) 1 B. N. C. 735.

(b) 5 Moore, 330.

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WOODMAN v. GOBLE.

THIS was an action to recover the amount of an attorney's bill. The defendant, after obtaining time to plead upon the usual terms of "pleading issuably," and rejoining gratis, pleaded that no signed bill was delivered. The plaintiff replied, that a signed bill was delivered, concluding with a special traverse to the country. The similitude having been added by the plaintiff, the defendant struck it out, and demurred specially to the replication for duplicity. The plaintiff signed judgment, on the ground that the terms of pleading issuably were not confined to the plea only, but extended to the subsequent proceedings.

The order for further time to plead upon the terms of "pleading issuably, rejoining gratis, &c.," applies to the plea only, and not to the subsequent proceedings.

Whately having obtained a rule to set aside the judgment for irregularity,

J. L. Adolphus shewed cause.—The plaintiff was justified in signing judgment, as the demurrer is frivolous. [*Parke*, B.—If that be so, you should have applied to set it aside.] It is true, that in *Dewey v. Sopp* (a), it was held, that the terms of pleading issuably and rejoining gratis did not oblige the defendant, at all events, to join issue to the country, but only where the replication offered a fair issue. But the defendant is precluded from raising any objections, which he could not have taken advantage of on general demurrer: *Bell v. Da Costa* (b). In *Sawtell v. Gillard* (c), the defendant being under terms of pleading issuably, demurred specially to the plaintiff's replication for duplicity; and *Abbott*, C. J., says, "The only general rule which the Court can lay down is, that where

(a) 2 Str. 1185.

(b) 2 B. & P. 446.

(c) 5 D. & R. 620.

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a party has obtained time on terms of pleading issuably, and, by his pleading, fails to bring the merits of the case, or some question of fact, or some question of law arising upon the facts, in issue, he does not comply with the conditions of the order. Here, the defendant was bound to plead issuably; instead of which, he demurs to the replication specially, upon a collateral circumstance." It was decided in *White v. Givens* (a), that where a defendant is under terms of pleading issuably, he must plead such a plea as he intends bonâ fide to abide by; and that, after having pleaded a special plea, he could not strike out the plea, and plead the general issue, although he had not been ruled to abide by his plea. *Langford v. Waghorn* (b) shews that, at all events, it must be a fair and bonâ fide demurrer. In *Gisborne v. Wyatt* (c), the plaintiff replied double, and the Court held that defendant could not demur specially, as he was under terms to plead issuably. [*Parke, B.*—That case is hardly an authority one way or the other.] The only authorities on the other side are *Betts v. Applegarth* (d), and *Barker v. Gleadow* (e); but the latter is the opinion of a single Judge, in opposition to the cases enumerated.

Whately, in support of the rule.—The venue is laid in Northumberland, and it would be almost impossible for a defendant, in the ordinary course of proceeding, to plead within the eight days allowed him. The Court then grant an indulgence, upon the terms of his pleading an issuable plea: that means, that the plea, when put in, should tender an issue. *Dewey v. Sopp* only decided that a party must not demur for delay, but for good cause. *Sawtell v. Gillard* cannot be considered law at the present day. In *Betts v. Applegarth*, *Best, C. J.*, says, "The order for

(a) 6 M. & S. 415.

(b) 7 Price, 670.

(c) Ante, Vol. 3, p. 505.

(d) 4 Bing. 267.

(e) Ante, Vol. 5, p. 134.

time, under terms of pleading issuably, must apply to the existing state of the cause at the time it is issued, and does not extend to cover subsequent errors. If it did, the parties might go on blundering to the end of the cause." *Barker v. Gleadow*, which was very elaborately considered, is precisely in point.

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PER CURIAM.—We will take an opportunity of consulting the Judges of the other Courts: it is very important to have some uniform rule.

PARKE, B., on a subsequent day, said—We have consulted the Judges of the two other Courts, and they all agree that the true construction of the common order for time to plead upon terms of pleading issuably, applies to the plea only, and not to the other subsequent proceedings. We therefore admit the authority of *Betts v. Applegarth* and *Barker v. Gleadow*.

Rule absolute.

CUMMING v. COLUMBINE.

W. H. WATSON had obtained a rule to tax the defendant the costs of the proceedings subsequent to the writ of summons. It appeared that the plaintiff had agreed with the defendant to edit a newspaper at a weekly salary, and the action was brought for dismissing the defendant from that employment, and also to recover sixteen guineas due for salary. After the writ was served, a summons was taken out, before a Judge at chambers, to stay proceedings, upon payment of sixteen guineas and costs. The summons was attended by the plaintiff's attorney, who re-

The plaintiff having contracted with the defendant to serve him at a weekly salary, sued the defendant for wrongfully dismissing him from his service, and also for arrears of salary. After writ issued, a summons was taken out to stay proceed-

ings, on payment of arrears of salary. This was refused, and the arrears were paid into court, and accepted by the plaintiff in full satisfaction:—*Held*, on motion to tax the defendant his costs, that the fact of the plaintiff having obtained a more profitable employment after action brought, was sufficient to rebut the presumption of a vexatious refusal of the sum tendered, and therefore the defendant was not entitled to his costs.

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fused to accept that sum, alleging more to be due. The plaintiff afterwards delivered a declaration, containing a special count for improperly dismissing him from the defendant's service, and also the common count for work and labour. Upon this latter count the defendant paid sixteen guineas into court, which the plaintiff accepted, and entered a nolle prosequi as to the other count.

Storks, Serjt., shewed cause upon an affidavit of the plaintiff, which stated that, after he had brought the action, he had obtained literary employment of greater value; and being advised that that circumstance would operate in mitigation of damages on the first count, he had accepted the money paid into court.

W. H. Watson contended that the general rule was, that if a defendant offered to pay part of a debt, which the plaintiff refused to accept, and then the defendant paid that money into court, if the plaintiff took it out, the defendant was entitled to costs from the time of the offer: *Marryott v. Clapp* (a), *James v. Raggett* (b).

PARKE, B.—If the effect of getting employment at a higher salary was that the jury might take that circumstance into consideration in estimating the damage, and would probably give merely nominal damages upon the first count, I think the plaintiff was right in taking the money out of court. It appears to me that the plaintiff has answered the presumption of a vexatious refusal of the money at one time, and the accepting it at another (c).

Rule discharged, with costs.

(a) Ante, Vol. 1, p. 701.

(b) 2 B. & Ald. 776.

(c) See *Gower v. Elkins*, ante, p. 335.

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PARKER, Executrix of PARKER, v. RILEY.

THE declaration stated that heretofore and during the life time of Charles Elmes Parker, deceased, to wit, on 1st January, 1836, the defendant was indebted to the said C. E. P. in 400*l.*, for the work and labour, care, diligence, and attendance of the said C. E. P. deceased as aforesaid, *by him and his clerks before that time, done, performed, and bestowed, as the attorney and solicitor of and for the said defendant,* and otherwise and upon his retainer in and about prosecuting, defending, and soliciting of divers causes and suits, and certain business for the said defendant upon his retainer and at his request, and for fees due and of right payable to the said plaintiff in respect thereof, and also for other the work and labour, care, diligence, and attendance of said C. E. P. deceased as aforesaid, by him before then done, performed, and bestowed in and about the drawing, copying, and engrossing of divers pleadings, briefs, and writings, for the said defendant upon his like retainer and request, *and in and about other the business* of the said defendant, and for him and at his request; and also for divers journeis and other attendances by the said C. E. P. as aforesaid, before then made, performed, and given in and about the business of the said defendant, and for him and at his like retainer and request. There were also counts for money paid, money lent and advanced, and on an account stated. The defendant pleaded, as to the first and second counts of the declaration, that the said work *and labour, care, diligence, and attendance* in the said first count mentioned, *were respectively done, performed, and bestowed by one Richard Stoomley, and by clerks and servants employed by the said R. S.,* by his direction and under his superintendence, management, and control, *and not otherwise,* in and about the commencing, prosecuting, and defending the said

Where the replication de injuriâ is inadmissible, the objection can only be taken on special demurrer.

To an action for work done by the plaintiff's testator as an attorney and solicitor, the defendant pleaded that the work was done by one R. S. in the name of the testator; that R. S. was not qualified to act as an attorney; and that the testator, knowing him to be unqualified, permitted him to use his name: —*Held*, that the replication de injuriâ was bad.

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causes and suits in the declaration mentioned, the same being certain causes and suits prosecuted and defended for and on behalf of the defendant by the said R. S., in the name, but without the control or interference of the said Charles Elmes Parker, in his then Majesty's Courts of King's Bench and Common Pleas at Westminster; and that the said pleadings, briefs, and writings in the declaration also mentioned, were drawn, copied, and engrossed in the cause and for the purpose of prosecuting and defending the said causes and suits; and that the said journies and attendances in the declaration mentioned, were performed and given by the said R. S. and clerks and servants employed by him, and by his direction, in the course and for the purpose of prosecuting and defending the said causes and suits, and in relation thereto; and that the said money in the said second count mentioned, was money paid and disbursed by the said R. S. in and about the prosecution and defence of the said causes and suits; and the defendant further saith, that the said R. S. never was admitted to act as an attorney or solicitor in the said Courts or either of them, or in any Court of law or equity in such manner as is directed by the statute in such case made and provided, or was a person duly qualified to act as an attorney or solicitor; and he, the said R. S., before and for the whole period at and during which the said work and labour, care, diligence, and attendance were done, performed, and bestowed, and the said journies and attendances were performed and given as in the declaration alleged, was a person unqualified to act or practice as an attorney or solicitor: and the said defendant further saith, that the said Charles Elmes Parker, before and during the period last aforesaid, was a sworn attorney of his then Majesty's Courts of King's Bench and Common Pleas at Westminster, and that the said Charles Elmes Parker being such sworn attorney, and then well knowing that the said R. S. was not duly qualified to act as an at-

torney or solicitor, and that the said R. S. was such unqualified person as aforesaid, did then permit and suffer the said R. S. to make use of the name of him the said Charles Elmes Parker upon the account and for the profit of the said R. S., so being such unqualified person as aforesaid, and the said R. S. did accordingly, in pursuance of such permission and sufferance, make use of the name of the said Charles Elmes Parker, with his privity and knowledge, and for the profit of the said R. S. in and about the commencing, prosecuting, and defending the said causes and suits respectively, and in and about the drawing, copying, and engrossing the said pleadings, briefs, and writings, contrary to the statute, &c.

To this plea the plaintiff replied *de injuriâ*, to which there was a *general* demurrer.

Swann, in support of the demurrer.—The replication *de injuriâ* is only admissible where the plea amounts to matter of excuse for the non-performance of the promise: *Isaac v. Farrar* (a), *Crisp v. Griffiths* (b). But when the plea denies the promise alleged in the declaration, or the facts from which the law implies a promise, the replication *de injuriâ* is inapplicable: *Solly v. Neish* (c), *Whittaker v. Mason* (d). Here the plea shews the work never was done by the testator, but by another person to whom he illegally lent his name.

The COURT then called upon

Platt, in support of the replication.—The plea amounts to matter of excuse; it admits the contract, but shews the work was done under such circumstances as to excuse the party from paying for it. Besides, the objection to

(a) Ante, Vol. 4, p. 750.

(b) Ante, Vol. 3, p. 753.

(c) Ante, Vol. 4, p. 248.

(d) 2 Bing. N. C. 359.

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the replication can only be taken advantage of on special demurrer. *Isaac v. Farrar*, and *Solly v. Neish*, were both cases of special demurrer. In *Curtis v. The Marquis of Headfort* (a), Coleridge, J., decided that this objection could only be taken advantage of on special demurrer.

Swann, contra.—In *Hooker v. Nye* (b), the defendant, by his plea, claimed an interest in land, and the replication de injuriâ was held bad on general demurrer. *Alderson*, B., there says, “the replying de injuriâ when that plea is inadmissible, is most clearly matter of substance, and may be taken advantage of on general demurrer.” *Curtis v. The Marquis of Headfort* does not apply, as that was an application to sign judgment on the ground of the demurrer being frivolous.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B.—Two questions arise on this record—first, whether the general replication de injuriâ to a plea of this kind be good; and, secondly, if not, whether the objection be open on a general demurrer.

We are disposed to think that the replication is bad. It is somewhat difficult to say what the precise ground of defence stated in the plea is, but it must be either that the defendant had not the benefit of the skill and personal superintendence of the plaintiff's testator, for which, he must be presumed to have contracted, or that the plaintiff was not entitled to recover on the ground of the illegality of the transaction, or both; and on either of these suppositions the plea does not consist of *mere matter of excuse* for the non-performance of the contract declared on.

(a) Post.

(b) 1 C. M. & R. 258.

It either amounts to the general issue or is an avoidance of the contract itself. On the first supposition it is clear the replication is bad; on the other, we all are strongly inclined to think it is so; but the second question then arises, whether the replication is not good on general demurrer.

There are conflicting authorities on this point; but we think, upon consideration, that the objection cannot prevail unless it be assigned as a cause of *special* demurrer.

The first case in the books upon this point is that of *Fursden v. Weeks* (a), in which it was held that the replication was bad on general demurrer, when it improperly put in issue several facts. But the Court appear to have proceeded upon the ground that a matter of record was thereby put in issue (though probably this circumstance would make no difference), and, besides, as is remarked in Mr. Fraser's note to *Crogate's case*, 8 Coke, 76 a, the case accrued before the 4 Anne, c. 16, which enacts that on demurrer the Judges shall proceed to give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, or defect in any pleading, &c., except those which the party demurring shall set down and express together with his demurrer, notwithstanding that such imperfection, omission, or defect might theretofore have been taken to be matter of substance not aided by the 27 Eliz. c. 5; so that the statute itself shews that the reason why it was made was, that too strict a construction had been put in practice on the statute of Eliz.; and in recent cases, as Mr. Fraser correctly states, the objection seems uniformly to have been made the ground of special demurrer. In *Banks v. Parker* (b), and *Swaffe v. Solly* (c), this objection was held to be holpen after verdict by the

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(a) 3 Levinz, 65.

(b) Hob. 76.

(c) 1 Brownlow, 200.

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Statute of Jeofails *as matter of form*; and for the same reason, no doubt, it was likewise so held in *Sir Thomas Raymond*, 50, though matter of record was involved in the issue. This Statute of Jeofails was the 18 Eliz. c. 14, which enacted that judgments should not be reversed for any default in form in any declaration, &c., suit or demand, words very nearly the same as those of the 27 Eliz. c. 3, viz. any defect or want of form in any declaration or other pleading or course of proceeding; and it would seem that if the default in question be want of form under one statute, it must be under the other.

In conformity with this view of the case my Brother *Coleridge* decided a short time ago in *Curtis v. Marquis of Headfort*, which is not reported, that the objection could not prevail except on special demurrer; on the other hand, in the case of *Hooker v. Nye* (a), Lord *Lyndhurst* and my Brother *Alderson* held that the replication of *de injuriâ*, if bad, was bad on general demurrer, and Lord *Lyndhurst* said, that in *Fursden v. Weeks*, the Court decided that the objection must prevail on general demurrer, though the statute of 27 Eliz. was then in force, which enacted that the judges should give judgment without regarding matter of form, which shewed that this objection was not mere matter of form. But his Lordship does not appear to have adverted to the circumstance above mentioned, that too strict a construction had been put upon the statute of Elizabeth, which appears by the statute of Anne itself to have been the reason for the enactment of that part of it which relates to special demurrers. Nor does the attention of the Court appear to have been drawn to the cases in which this objection was held to be mere matter of form under the statute of Jeofails.

The objection in this case appears to bear a strong

(a) 4 Tyrr. 777; S. C. 1 C. M. & R. 258.

analogy to that of duplicity, which is clearly matter of form, Com. Dig. Pleader, 94. Upon the whole we think that this objection ought to have been made the ground of special demurrer, and therefore our judgment must be for the plaintiff.

Judgment for the plaintiff.

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RADFORD and Another v. SMITH.

THE declaration stated that before and at the time of the making of the promise hereinafter mentioned, the sheriff of Middlesex had seized and taken in execution certain goods and chattels of the plaintiffs, and A. Radford, under and by virtue of a writ of fieri facias, before then issued out of the Court of Queen's Bench, upon a judgment before then obtained upon a warrant of attorney, given by the plaintiffs and the said A. Radford to one C. Torrard, for the use and benefit of the defendant, and as trustee for the defendant, and as a security for money then due from the plaintiff and the said A. Radford to the defendant, which said goods and chattels, from thence until and at the time of the making of the promise hereinafter mentioned, remained in the custody of the said sheriff, and thereupon it was mutually agreed between the plaintiffs and the defendant, that the plaintiffs should give to the defendant two several warrants of attorney, to wit, a warrant of attorney for the sum of 57*l.* 14*s.*, being the sum mentioned in the judgment upon which the fieri facias issued as aforesaid, and another warrant of attorney for 54*l.* 3*s.*, and that the defendant should cause the proper goods and chattels of the plaintiff to be given up to them: averment, that the two sums of money mentioned in the warrants of attorney amounted to a greater sum than the sheriff could have levied under the fieri facias, (mutual

The declaration stated that the sheriff had taken the plaintiffs' goods in execution under a writ issued on a judgment entered on a warrant of attorney, and thereupon, in consideration that the plaintiffs would give to the defendant two warrants of attorney, the defendant promised to cause the goods to be re-delivered:—

Held, first, that a sufficient consideration appeared to support the promise, and that it was not necessary to set out the warrants of attorney; secondly, that it was not necessary to allege a request to re-deliver the goods.

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promises). Breach, that although in pursuance of the said agreement, the plaintiffs, in a reasonable time, gave to the defendant two warrants of attorney for 57*l.* 14*s.* and 54*l.* 3*s.*, and although a reasonable time for the re-delivery of the said goods and chattels has long since elapsed, yet, the defendant has not caused or procured the said goods and chattels, or any part thereof, to be delivered up to the plaintiffs. Special demurrer, assigning for cause that the warrants of attorney should have been set out in the declaration, in order that it might appear that there was a good consideration for the delivery of the goods.

Mansel, in support of the demurrer.—There are two objections to the declaration. First, it does not set forth the warrants of attorney, but merely states them to be warrants of attorney for a certain sum of money. It ought to have been shewn that the taking such instruments was a benefit to the defendant. In *Bolton v. Fenne (a)*, the plaintiff declared that he was possessed of several tickets for seamen's wages due to them, and had solicited the Treasurer of the Navy for payment of them, who ordered the defendant, his clerk, to pay them; and in consideration that the plaintiff would no further trouble the Treasurer of the Navy for payment of them, the defendant promised to pay them. After verdict for the plaintiff, it was objected in arrest of judgment, that it did not appear that the plaintiff had any interest in the money, or authority to receive, for he did not shew any assignment of the bills, or letter of attorney, or other authority; but the Court said, that after verdict it would be intended. Here, the objection is taken on special demurrer. [*Parke, B.* Supposing there had been a judgment by default, would this declaration be bad in arrest of judgment?] It is submitted that it would: these instruments might be mere

(a) 1 Lev. 257.

letters of attorney, their legal effect ought to appear, in order that it might be shewn that there was some detriment to the one party and benefit to the other.

The second objection is, that the declaration contains no statement of a request to re-deliver the goods. Where the duty is merely to pay money, a request is unnecessary; in other cases, it must be averred and proved. [*Parke, B.*—The contract is to procure the re-delivering of the goods without a request.] In *Bach v. Owen* (a), the plaintiff agreed to give defendant a colt in exchange for defendant's mare, and to pay defendant two guineas, and it was held that the plaintiff could not maintain the action, without averring a special request to deliver the mare.

Cowling, in support of the declaration, contended as to the first objection, that it was not necessary to be more precise than the terms of the contract; and as to the second, that it was only in cases of a collateral engagement to do an act on request, that a request was necessary.

PARKE, B.—If the contract itself is looked to there can be no doubt as to the meaning of the warrants of attorney. The contract states that, a certain warrant of attorney was given by the plaintiffs, authorizing judgment to be entered up. It then avers that, in consideration that plaintiffs would give defendant two several warrants of attorney, one for 57*l.* 14*s.*, the same sum for which the judgment was obtained upon which the fieri facias issued, the defendant promised to cause the plaintiff's goods to be re-delivered. It appears to me clear, from the terms of the contract, that they must have been warrants of attorney to enter up judgment; but even if they had been warrants of attorney to receive a sum of money, they would have been a sufficient consideration.

(a) 5 T. R. 409.

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With regard to the omission of a request, the contract is to deliver the goods absolutely, and no request is necessary. *Bach v. Owen* is very imperfectly reported; there is no doubt that by the terms of the contract, a request was necessary, or the objection would not have been taken.

Judgment for the plaintiff.

SYKES v. REEVES.

In an action for not accepting railway shares, the Court refused to allow the defendant to plead that the contract was for goods, and that there was no note in writing, together with a plea that it was a contract for an interest in land, and no such note.

HOGGINS moved for leave to plead several matters. The action was brought for not accepting and paying for certain shares in a Railway Company. The company had been incorporated by act of Parliament, but the alleged sale took place, before the act passed. It was proposed to plead the general issue, and two pleas of the Statute of Frauds, viz. that this was a sale of goods, and that there was no note in writing or earnest given; and also that it was a contract for an interest in land, and that there was no note in writing.

PER CURIAM.—You can only be allowed to plead one plea of the Statute of Frauds. There can be no difficulty in framing a plea which will meet both points.

BARTON v. RANSON.

Where an order of reference and enlargement of time have been made a rule of Court, it cannot be shewn as

cause against an attachment for non-performance of the award, that there was no affidavit that the time was duly enlarged; but if in fact there is no such affidavit, the proper course is to move to set aside the rule of Court.

KELLY shewed cause against a rule obtained by *Erle* for an attachment against the plaintiff for non-payment of money, in pursuance of an award. By the order of reference, the arbitrator was to make his award by a certain

day, with liberty to enlarge the time. An award was made, reciting that the time had been duly enlarged, but there was no affidavit of that fact. It was submitted, that a party seeking to bring another into contempt, should shew that every thing had been done which was requisite. [*Parke, B.*—That point was decided in *Davis v. Vass* (a)].

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Erle, contra, referred to the rule, making the order of reference and enlargement of time a rule of court. [*Parke, B.*—Is it the practice to make an enlargement of time a rule of court, without an affidavit that it was duly enlarged? If such affidavit be a necessary part of the practice, the rule of court will be good evidence of that fact. The case of *Dickins v. Jarvis* (b) is precisely in point.]

LORD ABINGER, C. B.—The proper course would be to enlarge the rule, so as to afford the plaintiff an opportunity of moving to discharge the rule making the order of reference a rule of court, and for the defendant to shew, by affidavit, that the time was duly enlarged.

PARKE, B.—If there has been no affidavit of the due enlargement of the time, the plaintiff should move to set aside the rule making the order of reference and enlargement of time a rule of court. We must assume, *primâ facie*, that the Court is correct in making that order and enlargement of time a rule of court.

Rule accordingly.

(a) 15 East, 97.

(b) 5 B. & C. 528.

1838.

The Court will not compel a plaintiff to produce a deed for inspection of the defendant, when the latter has no interest in the deed.

SMITH and Another v. WINTER.

WALLINGER moved for a rule nisi, calling on the plaintiff to produce a certain deed, in order that the defendant might inspect and take a copy thereof. It was alleged, that the deed was necessary for the proposed defence, which was, that the defendant was only liable in the action as surety, and that time had been given to the principal. The deed was executed by the plaintiff, but the defendant was no party to it. [*Parke, B.*—The only case in which such an application is allowed is where a party holds a deed as surety for another.] In *Bateman v. Phillips* (a), the Court compelled a defendant to produce an unstamped agreement in his custody, although the plaintiff was not an instrumentary party. [*Gurney, B.*—You should give a notice to produce it, and, if they do not, give secondary evidence of its contents.] In an action against a sworn broker of the city of London, for negligence in making a contract, the Court, on motion, compelled him to produce his books, in order to enable the plaintiff to inspect and take a copy of the contract: *Browning v. Aylwin* (b).

PARKE, B.—There, the defendant acted as the agent of both parties. In this case, the defendant has no interest whatever in the deed. If you have no other evidence, you must file a bill of discovery.

Rule refused.

(a) 4 Taunt. 157.

(b) 7 B. & C. 204.

1838.

BURCH v. POYNTER.

WORDSWORTH had obtained a rule to shew cause why the Master should not review his taxation, on the ground that no bill of costs had been delivered previously to taxation, as required by the rule of this Court of M. T. 1 Will. 4, r. 10. The action was brought on a bill of exchange, and the defendant had not appeared, and it had been referred to the Master to compute principal and interest.

The rule of the Exchequer, requiring the delivery of a bill of costs previously to taxation, does not apply to cases in which the defendant has not appeared.

Humfrey shewed cause upon an affidavit that application had been made to the Master, who stated the practice of the Court did not require any notice of taxation when the defendant had not appeared, and that in such case the costs were never allowed. Besides, the rule of H. T. 4 Will. 4, s. 17 (a), which was a rule of all the Courts, and which dispenses with notice of taxation where the defendant has not appeared, must be considered by necessary implication as superseding the rule of M. T. 1 Will. 4, r. 10. *Bolton v. Manning* (b) is an authority in point.

Wordsworth contra.—In the rule of H. T. 4 Will. 4, s. 17, no mention is made of the rule of M. T. 1 Will. 4, r. 10, which is peculiar to this Court, and it does not appear that the former rule was intended to affect it. [*Parke, B.*—That rule only applies to cases in which the defendant has appeared, otherwise how is the bill of costs to be delivered.] Here, the plaintiff has served a notice of taxation, and treated the case as if the defendant had appeared.

PARKE, B.—The rule of M. T. 1 Will. 4, r. 10, has, by

(a) Ante, Vol. 2, p. 308.

(b) Ante, Vol. 5, p. 769.

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necessary implication, taken away the necessity of delivering a bill of costs, if indeed such necessity ever existed in such a case as this.

Rule discharged, with costs.

JACKSON v. CAWLEY.

Where, to counts for money lent, money had and received, and money due on an account stated, there was one demurrer, on the ground that they did not specify any time, the Court set aside the demurrer as frivolous.

MANSEL moved to set aside a demurrer as frivolous. The declaration contained counts for money lent, money had and received, and for money due on an account stated. To these counts there was one demurrer, assigning for cause that no time was alleged. It was evident, from the case of *Lane v. Thelwell* (a), that it was not necessary to specify time except in the count on an account stated.

Pike shewed cause, and contended that the demurrer was good as to part, and could not therefore be set aside as frivolous.

LORD ABINGER, C. B.—It is quite clear the demurrer is good for nothing.

PARKE, B.—The demurrer is too large. The rule must be absolute.

Rule absolute.

(a) Ante, Vol. 4, p. 705.

DOE d. BLOXHAM v. ROE.

The omission of the allegation that John Doe is indebted to the Queen, and the "quo minus" in a declaration in ejectment, is immaterial.

KELLY moved to set aside the service of a declaration in ejectment. The declaration commenced by stating that Richard Roe was attached to answer John Doe, &c., and there was no allegation of his being "indebted to our lady the Queen," or of the "quo minus" at the conclusion.

[*Parke, B.*—It has been held that an impossible title may be rejected, provided the notice be sufficient.]

LORD ABINGER, C. B.—In point of fact Richard Roe is neither summoned nor attached, neither is it true that he is a debtor to the Queen. It appears to me that the omission is of no importance.

PARKE, B.—*Mr. Baron Bayley* stated, in this Court, that the strict form of declaration might be dispensed with, provided sufficient information was contained in the notice.

Rule refused.

LEWIS *v.* ALCOCK.

CASE. The declaration stated the recovery of a judgment against one Gompertz: that thereupon a testatum fieri facias issued and was delivered to the defendant, who was then sheriff of Surrey, to execute: it then alleged, that although there were then, and afterwards, and before the return of the said writ, divers goods and chattels of the said Gompertz within the bailiwick of the defendant as such sheriff, whereof the defendant could, and might, and ought to have levied the monies indorsed on the writ, whereof the defendant had notice, and although a reasonable time for the defendant to have made the levy, and before he made the return to the writ, had elapsed, yet the defendant, not regarding his duty as such sheriff, did not nor would within such reasonable time levy the said monies or any part thereof, but therein wholly failed and made default, and afterwards, to wit, on &c., falsely returned upon the said writ, that Gompertz had not any goods or chattels in his bailiwick, whereof he might cause to be levied the damages aforesaid. The defendant pleaded not guilty.

In an action against the sheriff for not levying under a *fi. fa.*, and falsely returning *nulla bona*, the plea of not guilty admits the judgment, the writ, the delivery of it to the sheriff, that there were goods in his bailiwick, and that he had notice of it. The only matters of defence available under that plea are, that he did levy within a reasonable time, and that he did not make the return alleged.

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At the trial before *Littledale, J.*, at the last assizes for the county of Surrey, evidence was tendered on the part of the defendant, to shew that Gompertz had not any goods within the defendant's bailiwick. This evidence was objected to by the plaintiff, on the ground that it was not admissible under the plea of not guilty. The learned Judge received the evidence, and a verdict was found for the defendant.

Channell, and *Petersdorff* having obtained a rule to enter a verdict for the plaintiff, or for a new trial,

Thesiger, Dowling, and *Turner* shewed cause, and endeavoured to distinguish the present case from *Wright v. Lainson (a)*. Here, the fact of there being goods in the defendant's bailiwick was not mere matter of inducement, or a fact separately and independently alleged in it, but it was involved in the breach of duty, and therefore was in issue under the plea of not guilty. In actions for an escape, the plea of not guilty operates as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. There could be no breach of duty unless Gompertz had goods in the defendant's bailiwick.

PARKE, B.—The inducement points out the duty of the sheriff to do the particular thing upon which the complaint arises. In *Wright v. Lainson*, the duty was alleged to be to pay over the money levied; and the breach was, that he did not so pay it over. Here, the duty pointed out by the inducement is, to levy within a reasonable time; and the breach is, that he did not so levy. There is then a further allegation that he returned nulla bona, which is a wrongful act, if the fact be true, as stated in the induce-

(a) Ante, p. 146.

ment, that there were goods of Gompertz within his bailiwick: but that fact must be taken to be true, inasmuch as it is not denied. The plea, by not denying, admits the judgment, the writ, the delivery of it to the defendant as sheriff, that there were goods in his bailiwick, and that the defendant had notice of it. The only propositions available to the defendant under his plea are, 1st, that he did levy within a reasonable time; and, 2ndly, that he did not make the return alleged. As to the illustration of the rule given in an action for an escape, we had to consider it in the case of *Wright v. Lainson*, and there is no doubt that the operation of the plea in that instance is incompletely stated. It operates as an admission, not only of the preliminary proceedings, but of all the facts stated in the inducement. The rule must be absolute for a new trial, the defendant to be at liberty to amend.

ALDERSON, B.—The plea of not guilty puts that fact in issue which is wrongful, if the facts stated in the inducement be true. Now, the inducement states as a fact, that there were goods of Gompertz in defendant's bailiwick; and that fact not being denied by the plea, is admitted to be true. Then it is alleged, that the defendant returned nulla bona. That return, therefore, becomes a wrongful act, by force of what is admitted in the inducement; and it is the wrongful act put in issue by the plea of not guilty. The word "falsely" denotes a conclusion of law, if the facts stated in the inducement be true; but it is not a separate and traversable allegation. As for the breach of duty in not levying, the defendant seeks to excuse himself, and improperly obtains a verdict by proof of a fact, the contrary of which is admitted by him on the record.

Rule absolute for a new trial, on payment of costs by the defendant, he being at liberty to amend his plea.

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1838.

HOLDERNESSE *v.* BARKWITH.

If, in a short cause, an attorney wilfully make a charge, however small, to which he is not entitled, the Court will not allow him the costs of taxation, though less than one-sixth is taken off.

ERLE moved for a rule nisi to rescind an order of *Gurney, B.*, “for the taxation of the costs of the plaintiff’s attorney, and that in case of less than one-sixth being taken off, the plaintiff should pay the costs of the taxation.” The writ was indorsed for 50*l.* debt, and 3*l.* costs. Upon taxation, 9*s.* 2*d.* were taken off, and the Master allowed 2*l.* 10*s.* 10*d.*

Platt shewed cause.—It is admitted by the taxation that the attorney is entitled to 2*l.* 10*s.* 10*d.*, and yet this rule is to give the plaintiff the costs of the taxation. [*Parke, B.*—If one-sixth is taken off, the attorney is to pay the costs, but not vice versa.] Costs are of a fluctuating nature, and an attorney cannot calculate exactly to how much he is entitled. [*Parke, B.*—In short cases of this kind, an attorney ought not to put down one shilling more than he is entitled to.] He must indorse upon the writ the probable amount of costs, and it is difficult for him to tell what the Master will allow. [*Parke, B.*—The only costs that are fluctuating are the costs of service.]

The COURT then examined the bill, by which it appeared that 3*s.* 6*d.*, charged for a letter, had been struck out, because it was not written; and there was another item of 2*s.*, to which the attorney had no claim whatever.

GURNEY, B.—If these facts had been before me, I should not have made the order.

PARKE, B.—If one shilling too much were *wilfully* charged, I think the attorney ought not to have the costs.

ALDERSON, B.—But if the charge was made through mistake or inadvertence, it is another matter.

PARKE, B.—A different rule may be applied where there is a long bill, from the case of a short one, where the attorney must know how much he is entitled to charge. The rule must be absolute.

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Rule absolute (a).

(a) See *Baker v. Wills*, 2 C. & E. 856; *Elwood v. Pearce*, 8 M. 415; *Mills v. Revett*, 1 Adol. Bing. 83, S. C.; 1 M. & Scott, 159.

DOE d. HINDLE v. ROE.

JAMES moved for judgment against the casual ejector. There were four tenants who were lessees of four adjoining houses, three of whom had been served personally, but the fourth had left the premises, and it was not known where he was to be found. The declaration had been fixed on the door of the house. The Court were inclined to think that the landlord should have proceeded as upon a vacant possession; but *Doe d. Osbaldiston v. Roe* (a) being cited, a rule nisi was granted, to be served in the same manner as the declaration.

When there were four adjoining houses, and three of the tenants had been personally served, but the fourth having left the premises, the declaration was affixed to the door of the house, the Court granted a rule nisi for judgment against the casual ejector, to be served in the same way as the declaration.

On a subsequent day the rule was made absolute, on affidavit of service as to all the tenants, on the authority of the above case.

Rule absolute (b).

(a) Ante, Vol. 1, p. 456.

ante, Vol. 2, p. 399.

(b) See *Doe d. Norman v. Roe*,

COURT OF COMMON PLEAS.

Hilary Term,

IN THE FIRST YEAR OF THE REIGN OF VICTORIA.

HILARY TERM, 1 VICTORIA, 1838.

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IT IS ORDERED, that the 17th article of the Rule made in Hilary Term, 2 Will. 4 (a), for regulating the practice of all the Courts of King's Bench, Common Pleas, and Exchequer of Pleas be from henceforth annulled; and that in all cases special bail may be justified before a Judge at Chambers both in term and vacation.

IT IS ALSO ORDERED, that no rule for a special jury shall be granted on behalf of any defendant or plaintiff in replevin, except on an affidavit either stating that no notice of trial has been given, or if it has been given, then stating the day for which such notice has been given, and in the latter case no such rule is to be granted, unless such application is made for it more than six days before that day; provided that a Judge may, on summons, order a rule for a special jury to be drawn up at any time.

IT IS FURTHER ORDERED, that henceforth every rule of Court delivered out in vacation shall be dated the day of the month and week on which the same is delivered out, but shall be intitled as of the Term immediately preceding such vacation.

DENMAN,

N. C. TINDAL,

ABINGER,

J. A. PARK,

J. PARKE,

J. B. BOSANQUET,

E. H. ALDERSON,

J. GURNEY.

(a) Ante, Vol. 1, p. 185.

1838.

DALEY (Executor) v. MAHON.

HURLSTONE moved for a rule, calling on the plaintiff to shew cause why judgment, which had been signed in this cause, should not be set aside for irregularity, with costs. The action was brought by the plaintiff as executor, and the declaration made *profert* of the letters testamentary. Oyer in writing was demanded, and the letters testamentary only, and not the will, were set out in the following form: "By the tenor of these presents, we John George, by Divine Providence, Archbishop of Armagh, and primate of the metropolis of Ireland, do make known to all men, that the last will and testament of James Daley hereunto annexed, was proved and approved in common form of law, and the validity thereof registered on the 1st April, 1836, and execution thereof and administration of the goods were and are granted by these presents to H. B. Daley, saving the rights of J.D. Lynch and M.M'Donough, the other executors, named therein." Judgment by default having afterwards been signed, the present application was made.

Oyer being craved of the letters testamentary, of which profert is made, the plaintiff suing as executor, the will as well as the letters testamentary must be set out, and judgment having been signed by the plaintiff by default, it will be set aside for irregularity, if the proper oyer has not been given.

It was contended that the will ought to have been set out, and a copy of it, certified under the hand of the Ordinary, given, instead of the mere certificate which had been given to the defendant. The will and letters testamentary should have been set out together, as one entire document. The rule having been granted,

Shée, on the part of the plaintiff, shewed cause. He contended, that sufficient had been done to meet the case. All that the defendant required to know was, that the plaintiff had authority to sue as executor, and as this was clearly shewn by the certificate, he had all necessary information. It would be useless to set out the whole will upon the record, because that would be attended with

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great expense, when the will itself might be examined in the place in which it was filed.

Hurlstone, contra, cited Williams on Executors, p. 158, and 1 Will. Saund. 291 (a), n., and contended, on their authority, that the will must be set out. The defendant, if he did not know the contents of the will, could not plead the non-joinder of other executors with the plaintiff. It would be impossible to inspect the will within the time allowed for pleading in abatement, because it was in Ireland.

TINDAL, C. J.—I think that in this case, the oyer craved has not been properly given. The ordinary form of the declaration is, that the plaintiff brings into Court the letters testamentary, by which it is sufficiently shewn that he is executor; the defendant then craves oyer, and it is customary to set the will out, because the letters testamentary incorporate the will annexed by express reference. That this is the general understanding appears from *Strange*, 412, where the declaration was of Trinity Term, and it was objected, that the instrument under the seal of the Ordinary did not bear date until the following November; but the Court said that an exemplification shewing that there was a probate before action was sufficient, and such was the course constantly pursued. In *Hensloe's case* (a), it is laid down, that the testament must be shewn, duly proved under the seal of the Ordinary. Therefore, when oyer is prayed, the defendant should have a copy of the will, as well as of the letters testamentary. The only objection is the expense, but the defendant is the person who bears the charge, and that will act as a sufficient check on improper demands of this description. Judgment

(a) 9 Coke's Rep. 38.

having been signed therefore in this case, without proper oyer being given, it must be set aside, and the present rule made absolute.

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The other Judges concurred.

Rule absolute.

BARTRUM v. WILLIAMS and Others.

PLATT shewed cause against a rule which had been obtained by *E. V. Williams* for setting aside the declaration, and all subsequent proceedings in this cause, for irregularity, with costs. It appeared that a bailable writ had been sued out against three defendants. They were all three arrested, and two of them went to prison; but the third, being an administratrix, obtained a superseas, and was discharged. A declaration was delivered by the plaintiff on the 22nd of November, 1837, against the two prisoners only; and, on the 16th of December, an application was made to Mr. Justice *Bosanquet* at chambers to set aside the declaration. That learned Judge, however, was of opinion that the order prayed for should not be made, because the parties were too late, and because several intermediate steps had been taken in the cause. It appeared, that previously to this application being made, the defendant's attorneys had demanded a declaration several times, being unaware that the declaration had already been delivered at the gaol for their clients, with whom they had had no communication. This application being refused, the defendants obtained time to plead, and subsequently pleaded. It was now submitted, that the opinion of the learned Judge at chambers was right, and that the course adopted by the defendants operated as a waiver of their right to come to the Court to set aside the declaration, on the ground of its having

Where three defendants are arrested on a bailable writ, one of whom, being an administratrix, is discharged, but the others go to prison, although the plaintiff shall declare against the remaining two defendants only, they cannot set aside the declaration for irregularity, after having pleaded.

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been delivered as against them only, the name of the third defendant, originally arrested, being omitted.

E. V. Williams, in support of the rule, contended that the Court, notwithstanding the apparent waiver which had taken place on the part of the defendants, would, nevertheless, make the rule absolute, its object being that the administratrix, who had been arrested by the defendant without any just cause, should enter a non pros., in order the better to support an execution for a malicious arrest. It would be seen that she could not do this by any other means than those she had adopted; and it was contended that she ought not to suffer in her rights by any act of negligence which might appear on the part of the other defendants. Those acts, however, did not amount to a waiver, for their object was to prevent judgment being obtained against the defendants, and they were no admissions that the plaintiff was proceeding regularly. *Woodcock v. Kilby (a)*, was a case where a summons for time to plead being taken out, was held to be no waiver of an irregularity. There, the defendants in vacation, took out a summons at Chambers to set aside the declaration for irregularity, but it was dismissed, and the Judge refused to grant time to apply to the Court in term, and the summons for time to plead was then taken out. *Rock v. Johnson (b)*, was also in point. The present mode of applying was the only means by which a non pros. could be obtained as regarded the administratrix.

TINDAL, C. J.—This is an application made by two defendants to set aside a declaration delivered by the plaintiff; and one of the grounds on which it is made is, that a third person was included in the writ on which they were arrested, who has not been declared against, and

(a) Ante, Vol. 4, p. 730.

(b) Id. p. 405.

who has been discharged on a supersedeas. I do not enter into the case of that third person, however, because she is not before the Court. A summons for time to plead was taken out, and a plea was actually pleaded, and yet they now come to ask us to set aside the declaration and all subsequent proceedings, when, upon every principle, they are out of Court. The rule must be discharged.

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The other Judges concurred.

Rule discharged

COLLEY v. SMITH and Others.

MURPHY moved for a rule calling on three of the defendants in this action, to shew cause why one of them should not be ordered to produce a partnership deed, under which, he had been acting, with the other defendants, in transactions with the plaintiff. There were four defendants, of whom three had suffered judgment by default.

The present application was made on behalf of Smith, the fourth defendant, who defended separately; and it was sworn that the deed was in the possession of the other defendants

TINDAL, C. J.—Why not serve them with a subpoena duces tecum?

Murphy said that some difficulty might arise, if such a course were taken, as to whether they could be examined in their own cause.

TINDAL, C. J.—The mere fact of their producing the deed would not render them witnesses; and I think it will be sufficient to serve them with a subpoena.

Rule refused.

Where there are four defendants, three of whom have suffered judgment by default, the three may be required by subpoena to produce a deed of partnership under which all four were acting with the plaintiff in the matters which gave rise to the action; but the Court will not make an order requiring them to produce the deed.

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ESDAILE v. MARSHALL.

When an application is made for a *distringas*, the affidavit should shew that the deponent believes the defendant to be resident in England; and when it is only alleged that inquiries have been made at the last "supposed" place of abode of the defendant, it is insufficient.

W. H. WATSON shewed cause against a rule which had been obtained by *Wilde*, Serjt., and the object of which was, that a judgment, signed in this cause, should be set aside for irregularity. It was an action brought by the plaintiff, who was a banker, against the defendant, on a bill of exchange for 2,500*l.*; and a *distringas* had been granted by *Park*, J., at Chambers, against the defendant, to which there was a return of *nulla bona*, and the plaintiff then entered an appearance for the defendant, and proceeded to judgment. Proceedings were afterwards had against the defendant on this judgment in the French courts, the defendant being resident in *France*. Cause was now shewn on affidavits, in which it was contended that the plaintiff had taken all the steps necessary to discover whether the defendant was resident in this country or not, and that the *distringas* and subsequent judgment were right. There was no bad faith on the part of the plaintiffs, and the terms of the act of Parliament (2 Will. 4, c. 39, s. 9,) had been complied with on the issuing of the *distringas*. The affidavits on which the writ had been granted stated that the bill of exchange became due on 26th August, 1826, and that the action was commenced in Hilary Term, 1836; and that inquiry had been made on the 5th, 6th, and 19th February, 1837, for the defendant, "at the last supposed place of his abode," Ebsford Cottage, Devonshire; but that the result of that inquiry was only, that the defendant was not there; and on subsequent inquiries being made, it was stated that the defendant was supposed to be in *London* or *France*.

Wilde, Serjt., in support of the rule, contended that the affidavit in support of the *distringas* was quite insufficient; for that neither the plaintiff nor his attorney denied

that he was acquainted with the fact of the defendant's being abroad when the *distringas* was obtained, or asserted that they believed he lived in England at that time. The affidavits did not even pursue the ordinary form of alleging the necessary number of calls and appointments which were required in every case which came before the Court, and it did not state that any inquiries were made of the friends of the defendant who were well known. The allegation, besides, of the inquiries being made at the last "supposed" place of abode of the defendant, was insufficient.

TINDAL, C. J.—It appears to me that the affidavit is so framed that the writ of *distringas* may be said to have issued without sufficient or the usual authority. We cannot say that the plaintiff had a knowledge of the defendant being abroad, but I think the party ought to be let in to defend on entering a common appearance. These matters must be watched very narrowly.

Rule absolute.

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NEWTON v. SPENCER.

WILDE, Serjt., shewed cause against a rule nisi which had been obtained for the review of the taxation of costs, on the ground that the attorney was not entitled to the costs which had been allowed. It appeared that the writ of summons in the action had been issued on the 12th of May, 1837, and the cause was tried at the last York Summer Assizes, the commission day of which was the 11th of July. By the statute 7 Will. 4 & 1 Vict. c. 56, s. 4, it was provided, "That any person who shall have been duly admitted an attorney in any one of her Majesty's Courts of law, at Westminster, shall be at liberty to practice in any other of her Majesty's Courts, although he may

The provisions of the statute 7 Will. 4 and 1 Vict. c. 56, are prospective only, and therefore an attorney commencing an action, before the act was in operation, in the Common Pleas, not being duly admitted an attorney of that court, is entitled to recover such costs only as were incurred after the passing of the act.

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not have been admitted thereof, and that no person having been duly admitted an attorney or solicitor in any of her Majesty's Courts of law or equity at Westminster, shall be prevented from recovering or receiving the amount of any costs which would otherwise have been due to him, by reason of his not being admitted an attorney or solicitor of the Court in which such costs shall have been incurred." This act received the royal assent on the 15th of July, 1837, and judgment having been signed on the 15th of November, in this cause, the costs were taxed, and the whole of those claimed were allowed, although the objection was taken, that the attorney, not being an attorney of this Court, was entitled to such only as had been incurred subsequently to the 15th of July. It was now stated, that many of the charges had been incurred after the royal assent was given to the bill, and that, as to the allowance of those items, there was no objection. But it was contended that those items incurred before the passing of the act, as well as those which subsequently became due, must be allowed, for the statute was retrospective in its provisions. The statute, besides, referred to the time at which it was sought to obtain the payment of costs, and not to the time at which they were incurred. At all events, the plaintiff would be entitled to recover those sums which he had himself advanced, as he ought not to be allowed to suffer in consequence of any neglect or irregularity of his attorney: *Paterson v. Powell* (a), and other cases, were in point. It had been held that the statute 3 & 4 Will. 4, c. 42, s. 31, by which executors were made liable to costs, had a retrospective effect, and that executors who had commenced an action before the passing of that act were liable to the costs of such action: *Freeman v. Moyes* (b) and these cases were analogous.

(a) Ante, Vol. 2, p. 738.

(b) 1 Ad. & El. 338.

Wightman, in support of the rule, contended that the statute was wholly prospective in its effects, and that no costs could be recovered by the attorney, in respect of any matter, before the royal assent was given. *Latham v. Hide* (a) was a case in which it was held, that where an attorney practised in a Court in which he was not admitted, he could not maintain an action for fees, nor even for money out of pocket. If the principle were held to apply to an action existing at the time of the passing of the act, it might be extended to an action which had been concluded long before. Supposing a judgment to have been suffered in this case on the 14th of July, would the attorney then be entitled to his costs? It was submitted, that he would not; and although they might be taxed after the act was passed, and it was at the time of the taxation that the attorney's demand would be made, yet he would have no title under the act. The words of the act were, that the attorney "shall be at liberty," &c., and surely this must be held to be prospective; and its being followed by the expression that the attorney "shall not be prevented from recovering or receiving the amount of any costs" which might be due to him, clearly carried out the obvious meaning of the previous part of the section, and declared that that should be the future practice pursued.

TINDAL, C. J.—It appears to me that the words of this clause, which empower attorneys to recover costs for business done in Courts in which they have not been duly admitted, are not retrospective. Before the act was passed, no attorney could sue for costs incurred in a Court in which he had not been admitted; but this act confers a power upon attorneys to transact business in any Court and to recover their fees for so doing, but the remedy need

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(a) Ante, Vol. 1, p. 594.

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not in any case be made more than co-extensive with the new authority which is given. As the attorney, then, has the right only from the 15th of July, he ought not to have the right to sue except for business done after that time. The act, therefore, appears to me be prospective only, and in this case will entitle the attorney to recover those fees only which were incurred since its coming into operation. The Master will give the attorney only such costs as accrued after the 15th of July.

Rule absolute.

HARTSHORNE v. WATSON.

Although, in an indenture by which premises are demised by the plaintiff to one A. C., by whom they are assigned to the defendant, it is provided that, in the event of there being rent in arrear, the plaintiff shall re-enter, "as if the indenture had never been made," the plaintiff is entitled to an action of covenant for the rent reserved, which accrued before the re-entry.

THIS was an action of covenant for rent brought by the plaintiff, as lessor of certain premises, against the defendant, as assignee of the lease. The declaration alleged, that on the 1st of April, 1812, by a certain indenture then made between the plaintiff and one A. C., the plaintiff demised unto the said A. C. a certain shop and premises, to have and to hold the said shop and premises unto the said A. C., his executors, administrators, and assigns, from the 25th of March then last past, for the term of twenty-six years; paying every year during the said term unto the plaintiff, &c., the net yearly rent of 100*l.* on the usual days for paying rent in the year, the first payment thereof to be made on the 24th of June then next ensuing, clear, &c., by virtue of which demise the said A. C. afterwards entered in and upon the said demised premises, and became and was possessed of the same for the term aforesaid, &c.; and that after the making of the said indenture, and during the term thereby granted, to wit, &c., all the estate of the said A. C., by assignment, &c., became and was legally vested in the defendant, who then entered into and upon the said demised premises, &c., and became and was possessed thereof for the residue of

the term before mentioned, and continued so possessed until the 25th of March, 1830. That after the said assignment, and after said defendant so, as aforesaid, became possessed, &c. to wit, &c., a large sum of money, to wit, a sum of 150*l.* of the rent aforesaid for the space of one year and two quarters of the said term then elapsed, the whole of such period having elapsed after the defendant had so by the assignment aforesaid become possessed, &c., became, and was, and still is in arrear and unpaid to the plaintiff. The defendant, in addition to some other previous pleas, pleaded that, in and by the said supposed indenture, it was provided that if the said rent should be behind and unpaid for the space of fourteen days next after any of the days of payment; or if the said A. C., his executors, &c., should neglect or fail in, or be guilty of a breach or non-performance of any of the covenants, clauses, conditions, and agreements in the said indenture contained, &c., from thenceforth it should and might be lawful to and for the said plaintiff, his executors, &c., into and upon any part of the said demised premises, in the name of the whole, to re-enter, and the same to have again, as if the said indenture had never been made; and that during the term, &c. to wit, on the 29th of March, 1830, default was made in the payment of the rent reserved, that is to say, for the said arrears which the plaintiff sought to recover in this action, to wit, &c.; and the said A. C., his executors, &c. therein neglected and failed in, and were guilty of a breach or non-performance of the covenants, clauses, conditions, and agreements in the said indenture contained, &c.; whereupon the plaintiff by reason thereof, after the said sum of 150*l.* of the rent aforesaid, for the space aforesaid had been and was in arrear, and fourteen days after the day of payment thereof, to wit, on the 1st of June, 1830, and before the commencement of this suit, into and upon all and every part of the said demised premises re-entered, and the

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same had again as if the said lease had never been made, whereby the said rent reserved and arrears thereof, and the said indenture, &c., became and were extinguished and released. And the defendant further pleaded, that the said supposed causes of action did not, nor did either or any part of them accrue within six years next before the commencement of this suit. The plaintiff replied as to the first plea, that except so far as related to the non-payment of 25*l.* of the rent aforesaid, to wit, the last quarter thereof mentioned in the declaration, that the plaintiff did not by reason of the non-payment of the rent, or any part thereof, except the non-payment of the said 25*l.* into or upon all or any part of the said demised premises re-enter, or the same have again, &c. modo et forma, and that the plaintiff prayed might be further inquired of by the country; and as far as the said plea related to the non-payment of the said sum of 25*l.* of the rent aforesaid, for the said space of one quarter of a year of the said term, to wit, the last quarter, &c., that the same was not sufficient in law. As to the second plea, so far as the same related to the non-payment of the sum of 25*l.* of the rent aforesaid, &c., that the cause of action mentioned in the declaration did accrue to the plaintiff within six years next before the commencement of the suit, and of this the plaintiff put himself upon the country; and so far as the said plea related to all the cases of action in the declaration mentioned, except the non-payment of the said last-mentioned sum of 25*l.*, that the said plea was not sufficient in law. Joinder.

Peacock, in support of the demurrer.—There were three questions to be considered in this case. First, whether re-entry under a proviso in a lease was any bar to an action for rent due prior to the re-entry; secondly, whether the lapse of six years was a bar to an action of covenant for rent in arrear; and, thirdly, whether the plain-

tiff was entitled to reply to a plea, admitting a portion of the plea, and demurring to the remainder. As to the first point on the re-entry under a proviso, he cited *Pennant's case* (a), by which it was decided that debt would lie for rent, notwithstanding a re-entry, on the contract between lessor and lessee. So, if a party brought an action of debt for rent he waived the re-entry, but he did not waive the debt by the re-entry. The plea was besides bad altogether, because it alleged that the plaintiff re-entered for six quarters' rent; but that could not be, for a plaintiff could re-enter for the last quarter only, which would be enough to satisfy the ground of entry: *Doe d. Wheeldon v. Paul* (b). There was another point, however, on which it was bad. There was no allegation of the demand of rent; but at common law, a party could not re-enter without a previous demand of rent, and that subject, too, was one of great nicety. If there was no demand, the plaintiff, in the event of his re-entering, would be a trespasser, but an allegation of trespass would be no answer to an action for the rent. On the second point, as to the Statute of Limitations, he would only refer to the late case of *Paget v. Foley* (c). The second plea, therefore, was bad altogether. The third point was, whether the plaintiff in his replication could traverse a part of the plea, and demur to the remainder. The cases of *Vivian v. Jenkin* (d), and of *Cousins v. Paddon* (e), were both in point.

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Hoggins, in support of the pleas, was prepared to admit that the two last points could not be maintained, and would therefore abandon them. The real question, then, was on the first plea. The proviso for re-entry in that plea was not a general proviso, but was in a particular form; and it directed that if the rent should be behind, or

(a) 2 Coke's Rep. 64 a.
(b) 3 Carr. & P. 613.
(c) 2 Bing. N. C. 679.

(d) 3 Ad. & El. 741.
(e) Ante Vol. 4, p. 488.

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unpaid for fourteen days after it was due, or if the lessee should neglect or be guilty of any breach of the covenant, it should be lawful for the plaintiff to re-enter into and upon any part of the demised premises in the name of the whole, and "the same to have again, as if the said indenture had never been made." A default was made, and the plaintiff re-entered, as if the lease had never been made. The plaintiff admitted this in his replication in the manner in which it was alleged; and he should submit, that in this state of things, an action of covenant could not be maintained against the assignee of the term, and the arrears of rent before the re-entry could not be recovered. With regard to the demand; in *Pennant's case* the re-entry was pleaded without stating any demand, and that was an action of debt, which turned on a privity of contract. Here, the defendant was sued in covenant upon an alleged privity of estate, but the estate was determined by the re-entry, and the plaintiff's right to sue no longer existed. It was contended, that in this lease the proviso for re-entry must be construed strictly, and that the person who put the clause in motion must pursue it strictly. The assignee, then, was right in taking the advantage of the strict words which it contained, and which were "the same as if the indenture had never been made." There was no case to be found to establish the forfeiture of rent as well as estate, or that rent could be recovered. It was a sufficient penalty for the assignee to lose his estate, and the lessor could not be materially prejudiced, as it was in his power to re-enter on the default of a single quarter.

Peacock, in reply, was stopped by the Court.

TINDAL, C. J.—The proper construction of this condition is, that from the time of re-entry the party should hold the premises as if the indenture had not been made;

that is, that both should be free from that time of the obligation of landlord and tenant, and the words only shew such to be the meaning of the terms employed. It could scarcely be held, that to an action of this description for rent, on an instrument under seal, that the lessee or assignee might plead, not payment or performance of the covenant, but a plea like that here put upon the record, that the lessor entered for non-payment. If the re-entry should take place, not only in consequence of non-payment of rent, but in consequence of non-repair, the lessor might lose not only the charges of repairing, but his rent too. This is a construction which cannot be supported, and I think that the only proper construction is that which I have suggested.

The other Judges concurred.

Judgment for the plaintiff.

BUTLER, Assignee of JAMES BAKEWELL, a Bankrupt, v.
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CRESSWELL moved for a rule nisi to set aside the verdict in this case, and to enter a verdict for the defendant on the issues on the second, third, and fifth pleas. It was an action to recover certain goods in the possession of the defendant, and was brought by the plaintiff in his character of assignee of one James Bakewell, a bankrupt, and the defendant pleaded first, not guilty; secondly, that the plaintiff was not assignee; thirdly, that the plaintiff was not possessed of this property as assignee; and the fifth plea alleged, that after the commission under which the plaintiff, and another person since deceased,

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Where, in an action by the assignee of a bankrupt's estate, the defendant pleads that he was not assignee, the petitioning creditor's debt, and the validity of the commission, are put in issue by the plea.

Where, after a commission of bankruptcy, the bankrupt is allowed to

remain in possession of newly acquired property as reputed owner, with the consent of the assignee, the goods are liable to be seized by the assignees of the Insolvent Debtors' Court, the bankrupt becoming subsequently insolvent.

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were appointed assignees, and which was dated the 19th of April, 1838, Bakewell surrendered himself in proper form, and obtained his certificate; and that subsequently he again entered into trade, and again became a debtor and a bankrupt, and that a fiat being issued, the defendant was appointed assignee, and that Bakewell had possession of the goods, as reputed owner, by consent of the plaintiff, as surviving assignee, the true owner; and that therefore the defendant had a right to dispose of them for the benefit of the creditors under the fiat. Issues were joined on the first, second, and third pleas; and to the fifth plea, there was a replication, alleging that the estate of James Bakewell, after the issuing of the commission under which the plaintiff was appointed assignee, was unable to pay fifteen shillings in the pound, and that the property in question, therefore, vested in the plaintiff as surviving assignee, being a part of his after acquired estate. To this, the defendant rejoined, alleging that before the petitioning creditor's debt, on which the fiat was issued, the estate of the said James Bakewell had produced sufficient to pay fifteen shillings in the pound to every creditor under the commission. The cause was tried before *Coltman, J.*, at Liverpool, and the defendant previously gave notice of his intention to dispute the petitioning creditor's debt, on which the commission of 1828 was founded, as well as the act of bankruptcy; but it was contended before the learned Judge, on the part of the plaintiff, that when evidence was produced of the issuing of the commission, and of the appointment of the plaintiff as assignee, sufficient proof was given in support of the issues which were raised. Evidence of these facts was then given, but, on the other side, it was proved that the defendant had previously been a bankrupt, and that subsequently to the second commission, and before the fiat of bankruptcy, Bakewell carried on a large trade at Manchester, in which he had at one time realised more than sufficient to pay fifteen shillings in the pound to the creditors; but the plaintiff also proved

the fact alleged in the replication, that the estate did not pay fifteen shillings in the pound at the time of the commission being issued in 1828. It also appeared that the bankrupt had been arrested for debt on the same day as the defendant's fiat issued, and afterwards made the usual assignment under the Insolvent Act.

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Atcherley, Serjt., and *Wightman* now shewed cause against the rule, and contended that the fact of the plaintiff being assignee only was put in issue by the second plea, and that he, having proved that he was duly appointed to that capacity, need not establish the goodness of the commission of bankruptcy; and if it was the intention of the defendant to set up a defence denying that the petitioning creditors' debt and the act of bankruptcy were available, he should have pleaded specially: R. G., H. T. 4 Will. 4, s. 21 (a). The correct form of denying the allegation would be to say, that Bakewell did not become a bankrupt within the meaning of the statute. With regard to the acquirement of the property by the bankrupt, although it might be with the permission of the plaintiff, yet that permission could not avail, because the plaintiff himself was possessed of it, not by his own right, but in his representative character of assignee, in which he could not consent to any illegal act being done, because he was not the true owner. *Drayton v. Dale* (b), and *Webb v. Fox* (c), were cases in point. And *Viner v. Cadell* (d) was a case in which it was held, that the wife of a bankrupt having administered to her father, and become possessed, as administratrix, of his effects, to which she and infant-brothers and sisters were entitled, and the husband had continued the business of the father for their benefit, that was not such a possession of the goods as would be deemed an ordering and disposition within the

(a) Ante, Vol. 2. p. 321.

(b) 2 B. & C. 293.

(c) 7 T. R. 391.

(d) 3 Esp. 88.

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statute 21 Jac. 1, c. 19; and also in *Fraser v. The Swansea Canal Company* (a), certain property had been mortgaged by C. to F. to secure the re-payment of certain moneys with a proviso, that, in case of default, F. should stand possessed of all the mortgaged property in trust, to levy out of the same so much as should be due to him. F. died, and the plaintiff took out administration, after which the mortgagor, who had remained in possession, made default, but was not dispossessed, and afterwards made a demise to another party, of which transaction the plaintiff was not proved to have any knowledge. The mortgagor's lessee took possession, and put his name on a portion of the goods, which consisted of barges, and these and other property were afterwards seized by the defendant for rates due from the mortgagor's lessee, and were sold before the seizure; the mortgagor's lessee having become bankrupt, it was held that the goods seized were not in his possession by consent of the true owner, within the 6 Geo. 4, c. 16, s. 72, for that the consent of the mortgagor, who was merely permitted by the true owner to retain possession, did not satisfy the terms of the statute. It was further contended, that the defendant had no power to set up a jus tertii under the third commission, but as this point was not decided, it is unnecessary to detail the arguments which were used.

Wilde, Serjt., *Cresswell*, and *Tomlinson*, in support of the rule, contended on the question whether the plea and the notice given by the defendant of his intention to dispute the plaintiff's title, made it necessary to prove the validity of the commission under which he claimed; that the plea which was on the record was such as would raise the questions, which it was submitted ought to be affirmatively proved, namely, the validity of the commission, and the act of bankruptcy. The words of the declaration

(a) 1 Ad. & El. 354.

were, that the plaintiff was assignee "according to the several statutes in force concerning bankrupts," and to that the defendant pleaded, that the plaintiff was "not the assignee of James Bakewell, according to the statutes now in force concerning bankrupts;" and, in order that the plaintiff should prove the affirmative of the issue, he must prove the act of bankruptcy, and the proper issue of the commission, for parties might become assignees by assignment in fact, but this was an assignment in law. *Scott v. Thomas* (a) was a direct authority in favour of the defendant's case; for there, the defendant pleaded that the plaintiff was not assignee of a bankrupt, and a verdict being returned for the defendant, on the ground that the act of bankruptcy was not proved by the plaintiff, the Court refused to grant a rule for a new trial. Then, secondly, it was not competent to the assignees of a bankrupt to suffer him to continue his trade, but it was their duty to protect the public from the consequences which might be produced by such a course; and, at all events, it was not in their power, after they had permitted him so to act, to come down and seize upon the goods of the persons who had given him new credit, in consequence of their neglect. Assignees were in no better situation than other trustees, and the fact of their acting as he had described would induce the Court to shew them no favour, but to allow them to bear the consequences of their own neglect. The fresh acquired property, at all events, could not belong to them, for it was obtained by the bankrupt in consequence of their wrongful act, and it would therefore vest in the new creditors. *Smith v. Topping* (b), and *Darby v. Smith*, (c), were cases in point. The case of *Fox v. Fisher* (d) was a decision which was exceedingly important as regarded this

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(a) 6 Car. & P. 611.

(c) 8 T. R. 82.

(b) 5 B. & Ad. 674; S. C. 2 N. & M. 421.

(d) 3 B. & Ald. 135.

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case. There, a person who was entitled to take out letters of administration, neglected to do so, but remained in possession of the goods of the intestate, and being so in possession, became a bankrupt; and a creditor of the intestate afterwards took out letters of administration, and claimed the goods from the assignees, and it was held that those goods were within the stat. 21 Jac. 1, c. 19, being property in the possession or disposition of the bankrupt, with the consent of the true owner, and that the assignees were therefore entitled to them. The judgment delivered then by Mr. Justice *Bayley* was strongly in favour of this application.

TINDAL, C. J.—If this case had depended upon the question of whether or not the plaintiff's character of assignee was proved, I should have been inclined to recommend that the case should go back for a new trial on that point, but I am of opinion that he has failed in shewing himself, on the construction of the act of parliament, the 6 Geo. 4, c. 16, to be possessed, as in that character, under the second commission. The 127th section of the Bankrupt Act provides, "That if any person who shall have been discharged by certificate, or who shall have compounded with his creditors, or who shall have been discharged by an insolvent act, shall be or become bankrupt, and have obtained, or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission 15s. in the pound, such certificate shall only protect his person from arrest and imprisonment, but his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife, and children) shall vest in the assignees under the said commission, who shall be entitled to seize the same, in like manner as they might have seized property of which such bankrupt was possessed at the issuing

of the commission." If that clause had stood alone, it might have been contended, that although the trading had been carried on for many years, the words of the act would have been sufficient to enable the assignees to seize the property acquired subsequently by a bankrupt, instead of its being taken under a second commission in the event of its issuing; but that is not the only clause, for there is another of extreme importance bearing on this case. It is section 72, which enacts "that if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission." Therefore, we must determine whether this 72nd section applies or not to this case. Now, it appears that from the date of the second commission to the time of the issuing of the fiat, the bankrupt has been allowed to carry on trade to a very great extent by the permission of the assignee of the second commission. But the assignee under that commission might, at any time, if the consent had not been given, have interposed and seized the property which was in his hands, to satisfy the creditors under the commission; and it was by the consent of the assignee only, therefore, that the bankrupt could have had the ordering and disposition of that property. The question, then, is, whether the assignee of the bankrupt is to be placed in a situation different from that of any other person; and I am of opinion, that neither in principle, nor on the language of the statute, can any distinction be held to exist; and that the character of an assignee cannot, on any ground, be held to be distinguishable from that of a trustee, for the assignee may be a trustee either

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as a creditor, or under an individual trust. Why, then, if the trustee, who is clothed with the character of a legal proprietor, permits this property to be in the hands of a party, and is liable to be deprived of it in the event of the party becoming a bankrupt, should the case of an assignee for creditors be held to be of a different description? The person who has the legal interest in the property, and who has lent it to a bankrupt, should be in no better condition than the other creditors to the estate, for it would be too much to say that where the mischief is so great, it may be extended even further than it can now go. Now, if this be the case, that the operation of these two sections together prevents the property from remaining in the hands of the bankrupt under the second commission, it is immaterial whether the third fiat is good or not; because, if under the Insolvent Debtor's Act there is a valid assignment, it is immaterial, for the purposes of this case, whether the goods are in the possession of one or other under the act. His Lordship having referred to the point as to the *jus tertii*, then said, that the verdict on the third plea being sufficient to decide the right between the parties, it became unnecessary to enter into the question of the payment of 15s. in the pound.

VAUGHAN, J.—I think, upon reference to this case, that the plaintiff has failed in shewing that he is legally the assignee under this commission, for I am of opinion that the plea that he was not assignee puts in issue his title to that character. Then upon the issue, as to whether he was possessed as assignee, I think he has failed in establishing the affirmative, that he is the assignee under the second commission; for looking at the 72nd section of the act, as well as the 127th, as also at all the facts which were proved in the case, I am of opinion that it was with his consent, as the true owner, that the bankrupt

had the custody of the goods, and that he therefore has no right to claim them. It is unnecessary to refer to the question of the validity of the fiat, and the verdict must be entered on the second and third issues for the defendant.

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BOSANQUET, J.—I am of opinion that the defendant here has a right to the verdict. With regard to the first issue, the Court have decided that the plaintiff has not made out his case in shewing that he was assignee under the statute. But even supposing that he was assignee, yet the defendant is entitled to the verdict, because the goods were left in the possession of the bankrupt, with the consent of the plaintiff, who is the true owner within the meaning of the clause. It does appear to me that he must be considered as the true owner as much as any person who was originally the owner of the property, because otherwise we must put a construction on this act which would place the assignees, as well as the creditors, in a position which would be most unjust.

COLTMAN, J. concurred.

HANNAH v. WILLIS.

IN this case a rule had been obtained on the part of the defendant, calling on the plaintiff to shew cause why a sum of 200*l.* paid into Court in lieu of bail, and a sum of 10*l.* paid into the hands of the sheriff's officer on the 5th of the alleged debt, and 10*l.* for costs, in the hands of the sheriff, in pursuance of the 43 Geo. 3, c. 46, s. 2, but the sheriff, although frequently applied to, neglects to pay the money into court until the evening of the day on which the time for putting in bail expired; and the defendant then, on the next day, under the 7 & 8 Geo. 4, c. 71, s. 2, pays an additional sum of 10*l.* into court for costs, but which the officers had refused to receive before the sum of 210*l.* was paid in by the sheriff; and the latter sum has been paid over to the plaintiff under a rule of court, against which the defendant had an opportunity of shewing cause; the Court will not order the plaintiff to refund the money, in order that its deposit may be considered as equivalent to putting in and perfecting bail.

Where a defendant has been arrested on a *capias*, and has deposited 200*l.*, the amount

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May, but since paid over to the plaintiffs, and also a further sum of 10*l.* paid into Court on the 6th May, for costs to abide the event of the suit, should not be deemed equivalent to the defendant having put in and perfected bail to the action in due time.

Wilde, Serjt., and *Knowles*, now shewed cause.—The circumstances of the case were as follows:—A writ of *capias* was sued out against the defendant at the instance of the plaintiff, indorsed for 200*l.*, and on its being executed the defendant paid the sum of 210*l.*, under the statute 43 Geo. 3, c. 46, s. 2, into the hands of the sheriff; 200*l.*, the alleged amount of the debt, in lieu of bail, and 10*l.* for costs. The period for putting in bail above expired on the 5th May, and although the defendant made numerous applications to the sheriff before that time to pay the money into Court, he neglected to do so, until after the proper time for putting in bail. The plaintiff then applied to the Court that the money might be paid out to him, and obtained a rule nisi. The defendant shewed cause against that rule on the 8th May, contending that there had been no fault on his part, all the blame being attributable to the sheriff; but the Court, nevertheless, made the rule absolute, and the money was paid over to the plaintiff. On the evening of the 6th May, on which day that rule was obtained, the defendant had paid a further sum of 10*l.* into Court for costs, the 210*l.* having been then lodged in the hands of the officer to abide the event of the suit, the officer having before declined to receive it, because the money had not been paid over by the sheriff. The present rule was obtained on the 3rd November, the whole of Trinity Term and the long vacation having therefore elapsed since the money had been paid to the plaintiff. It was now contended that the present rule was, in fact, an attempt to re-open the question decided by the rule of the 8th May, but which the Court

would not sanction. The defendant had shewed cause against that rule, upon grounds which were substantially the same as those upon which this rule had been obtained. It was submitted, first, therefore, that the question had already been disposed of; secondly, that the application came too late; and, thirdly, that under the statute the defendant could not do that which he desired. The arrest and deposit took place on the 26th March, and the defendant's case was that the sheriff neglected to pay the money into court which had been deposited in his hands. But if the sheriff had neglected his duty, it was for the defendant to take advantage of it in a proper manner, and there was no ground for depriving the plaintiff of the advantage which he had properly gained. The money had been paid to the plaintiff as a satisfaction of his demand, and no power existed under the statute to compel him to return it. The object of the plaintiff's first application was to have the money handed over to him in payment, and it was as a payment only, and not as a deposit, that the Court could order it to be given to him. If the allegation which the defendant made were true as to the neglect of the sheriff, it was in his power to have come to the Court, and to have represented the facts before the time elapsed, and to have obtained an extension of the time limited. *Geach v. Coppin* (a), was a case in point. In *Straford v. Love* (b), the money had been paid in in time, and the same fact appeared in the case of *Rowe v. Softly* (c).

Bompas, Serjt., and *Petersdorff*, in support of the rule, contended that the money must be considered to have been deposited in the hands of the sheriff, not in payment of the plaintiff's demand, but to abide the event of the suit: 7 & 8 Geo. 4, c. 71, s. 2. The Courts had exercised power in cases of payment of money into Court, analo-

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(a) Ante, Vol. 3, p. 74.

(b) Id. p. 593.

(c) 6 Bing. 634.

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gous to that which they had used in cases of bail, and it was equally competent for them to act, in such cases, in the same manner as they had acted in setting aside the assignment of the bail bond. If the defendant had put in bail, he would have been entitled to come to the Court under the statute already cited, and to ask to have the assignment of the bail bond set aside. The effect of the statute was to give an additional protection to the sheriff; the sheriff was either the servant of the Court or of the plaintiff. He could not be the servant of the defendant, and he therefore had no control over him, but in the present case the act was the act of the sheriff, and he was employed by the plaintiff. From the case of *Stanforth v. M'Cann* (a), it appeared that it was sufficient to pay the 10*l.* into Court at any time before the time for doing so expired, and the defendant therefore had his election, up to the time at which bail should have been put in, as to what course he would take. The act ought not to be construed strictly but liberally, in order that the defendant might have an opportunity of going to trial on the merits, if he possessed any. This rule had already been acted upon; for, if the statute must be construed strictly, a render would not be sufficient to satisfy its provisions; but there were numerous cases in which a render had been held equivalent to putting in and perfecting bail: *Chadwick v. Battye* (b), *Harford and Others v. Harris* (c), *Gould v. Berry* (d), *Douglass v. Stanbrough* (e). If the plaintiff took the money in satisfaction, he should have done some act by which his intention would be shewn, but he had taken no steps by which his object was clearly expressed. Where money had been paid into Court under the statute of George 4, in order to give the

(a) Ante, Vol. 4, p. 367.

(b) 3 M. & Sel. 283.

(c) 4 Taun. 669.

(d) 1 Chit. Rep. 145.

(e) 3 Ad. & El. 316.

plaintiff a right to it, he must have obtained judgment, and this proposition was supported not only by the cases, but by the words of the statute itself: *Bull v. Turner* (a). And it appeared from *Johnson v. Wall* (b), that money paid into Court in lieu of bail, could not be paid out, unless judgment had been obtained, or the suit was otherwise legally determined. Here, however, there was no termination of the suit, but it was still pending, and in the event of any future action being brought, there would be no bar to it, for this could not be treated as a case of payment.

Cur. adv. vult.

TINDAL, C. J., now, in Hilary Term, delivered the judgment of the Court.—After recapitulating the facts of the case as they appeared in argument, he said, it has been insisted that the plaintiff ought not to have been permitted to take the money out of Court, after the additional 10% for costs had been paid in, and that, at all events, as the defendant was not to blame, and merits are now sworn to, the money ought not to be retained by the plaintiff, without his proceeding in the action; but, upon full consideration, we are of opinion that the defendant is not entitled to the relief which he seeks, and that this rule must therefore be discharged. The time for putting in bail expired on the 5th May, and no bail was then put in; the plaintiff was, therefore, by the terms of the act of 43 Geo. 3, c. 46, s. 2, entitled to have the money, which had been deposited, paid over to him. If, indeed, bail had been put in within due time, the plaintiff would not have been entitled to the money until the time for perfecting the bail had expired, and the defendant would have been allowed till the expiration of that time to pay the additional 10% under the statute of 7 & 8 Geo. 4, c. 71,

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(a) 1 M. & W. 47.

(b) Ante, Vol. 4, p. 315.

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s. 2. But, in a case where no bail have been put in within the proper time, the right of the plaintiff must necessarily attach as soon as the time for that proceeding has passed, because no time for duly perfecting bail can be predicated of bail which have never been put in. In the cases cited of *Rowe v. Softly*, *Stanforth v. M'Cann*, and *Straford v. Love*, bail had been regularly put in, and the Court held that the defendant had a right, till the time of perfecting bail had expired, to take advantage of the 7 & 8 Geo. 4, c. 71, s. 2. But, on the other hand, in the case of *Newman v. Hodgson* (a), money had been deposited with the sheriff in lieu of bail, and was paid into Court in pursuance of the act; but bail was not perfected in time, and it was held that the plaintiff could not take the money out of Court, though the defendant had rendered himself since the time of putting in bail, there being no affidavit of merits, and, in that case, the Court say that it was analogous to an application to stay proceedings commenced on a bail bond where bail had not been perfected in time, in which an affidavit of merits was always required. It has been settled, that if bail above be not put in within the eight days mentioned in the writ, the plaintiff is entitled to an assignment of the bail bond, and to proceed on it immediately: *Hillary v. Rowles* (b), and *Geach v. Coppin*. In this case, if, upon shewing cause against a former rule, an affidavit of merits had been produced, the Court, (as the second 10% had then been paid, although too late), might possibly have refused to make the rule absolute, but after the plaintiff, who is not in fault, has virtually received the money under the authority of a rule of Court, which was regularly made, in consequence of a default on the part of the defendant, we think the Court ought not to interfere.

Rule discharged (c).

(a) 2 B. & Ad. 422.

(b) Ante, Vol. 2, p. 201.

(c) See *Ferrall v. Alexander*, ante, Vol. 1, p. 132.

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COLLINS v. AARON.

BAYLEY, in Michaelmas Term, moved for a rule nisi, calling on the plaintiff to shew cause why so much of an order of Mr. Justice *Park*, made at Chambers on the 18th November, should not be rescinded, as related to the costs of an amendment, and why the defendant should not be allowed to plead de novo, and also why it should not be referred to the Master to tax the costs of the amendment. It appeared that the action was brought to recover the amount of value of goods sold and delivered to the defendant, and the plaintiff laid his damages at 100*l.* on the count for goods sold, and 100*l.* on an account stated, but he delivered a bill of particulars, in which he claimed the sum of 85*l.* as the balance of an account amounting to 419*l.* 14*s.* To this declaration the defendant pleaded two pleas, the first of which was the general issue, and the second was a plea alleging that the plaintiff had accepted the sum of 330*l.* in full satisfaction of his whole demand. The plaintiff then applied to the learned Judge, at Chambers, for leave to amend his declaration, and the summons being attended by the defendant's attorney, it appeared that the only amendment required was to alter the amount of the damages to 500*l.* in each of the counts of the declaration. The defendant opposed the application, but desired that if it were granted he should be allowed to plead de novo. This, however, was refused by the learned Judge, and the order for the amendment of the declaration was made on payment of costs. The parties went before the Prothonotary to have the costs taxed, but some difficulty arose, in consequence of which the matter was referred back to the learned Judge, who said that as there was a difficulty in the case, he would tax the costs himself, and he did so accordingly, allowing the defendant 3*s.* 4*d.*,

When an application is made at chambers to a learned Judge to make an order for an amendment of the declaration, the Judge has the power of determining the amount of costs to be paid, as the condition for making the order.

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and the order was then altered that the plaintiff should be at liberty to amend on payment of 3*s.* 4*d.* costs.

A rule nisi having been granted,

Wilde, Serjt., in Hilary Term, appeared to oppose its being made absolute.

The COURT, however, called upon

Bayley to support the rule.—He contended that that portion of the order which had reference to the costs was irregular, for a Judge at chambers had no power to tax the costs. Even, however, if the Court should be against him on that point, he should submit that 3*s.* 4*d.* was not sufficient to give for an amendment. There were two scales of taxing costs, one of which was to be used where the sum sought to be recovered was less than 20*l.*, and the other where it was more than that sum, but here the amount being over 20*l.* the defendant's attorney was at least entitled to 6*s.* 8*d.* for his attendance.

TINDAL, C. J.—It is quite clear that the defendant was wrong when he was before the Judge, on this amendment to insist upon his having a right to plead *de novo* instead of his praying to be permitted to amend his plea, for a very little amendment would have served to adapt it to the alteration of the amount of the damages in the declaration. The declaration originally contained general counts for work and labour, and for goods sold, and 100*l.* was laid as the sum sought to be recovered as damages. The plaintiff delivered his bill of particulars, saying that his original demand was 334*l.*, but that it was now only 85*l.*; then the defendant, seeing the fair way in which the plaintiff had framed his bill, turns it directly against him, and puts in a plea alleging that he had paid 334*l.* in bar of the

action. This compelled the plaintiff to go before a Judge, and he then says, "Give me leave to alter my claim of 100*l.* to 500*l.*" The plea which the defendant then had on the record would have been sufficient with some alteration, and if he had said "I must alter my plea so as to meet the amended declaration," it would have been enough, and his application would have been immediately granted; but, instead of that, he demands to be permitted to plead *de novo*, but his object was only to gain time, and therefore I think the learned Judge was right in refusing it. As to the sum of 3*s.* 4*d.* being allowed for costs, it would have been enough if the matter had taken the course which it should have done, and the defendant ought not to have any more.

PARK, J.—I will not say any thing upon the subject of the case, except to express myself of the same opinion with my Lord Chief Justice; but I must say that I am surprised that such a motion should have been made.

VAUGHAN, J.—One great object of all the Courts is to diminish the expenses attending the prosecution of suits at law. Now, here there were three counts in the declaration, in each of which damages to the amount of 100*l.* only were claimed. Then the defendant wishes for particulars of the demand, and the plaintiff candidly delivered particulars giving credit for 334*l.* which had been paid, and claiming 85*l.* only, so that the defendant knew the existing demand to amount only to that sum. Then the defendant, in order to drive the plaintiff into a corner, and to make it necessary that he should amend his declaration, puts a plea on the record which is not fair to the plaintiff. The amendment of the declaration is, by this, rendered necessary, and on its being granted, the defendant comes forward and demands to plead *de novo*. As to the power of the Judge to tax the costs, it is said that he has no

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power to perform any such duty, but that the parties should go to the Master. When it is recollected, however, that the Master is only a ministerial officer of the Court, it will be seen that the Judge may claim a right to perform the office himself if he is willing to do so.

BOSANQUET, J.—I think the defendant has brought this inconvenience entirely on himself by taking an unfair advantage of the plaintiff's candour, and he must take the consequences of it. With regard to the amount of costs, there is no doubt that the Judge had a right to fix the sum to be allowed, and I am sure that if the defendant had demanded a reasonable sum it would have been granted.

Rule discharged, with costs.

GAYLOR v. FARRANT.

Where, in replevin, the defendant avowed for three quarters of a year's rent under a holding from him, and at the trial, the principal question was whether the rent was 115*l.* or 100*l.*, and whether it was quarterly or half yearly, and the jury found that it was 115*l.*, and that it was half yearly, and that finding was entered on the record, the Court allowed the avowry to

THIS was an action of replevin, and the avowry was for three quarters of a year's rent due from the plaintiff, at a yearly rent of 115*l.*, payable quarterly, and the plaintiff pleaded non tenuit and riens in ariere. The questions which were most in dispute at the trial were, whether the payment of the rent should be half-yearly or quarterly, and whether the holding was at a yearly rent of 115*l.* or 100*l.*; and it appeared that three weeks before the trial, the defendant's attorney gave notice to the plaintiff, that if, at the trial, any variance should appear between the contract of tenancy set out in the avowry, and the evidence adduced to support it, either as to the amount of the rent reserved, or the mode in which it was to be paid, application would be at once made for leave to amend the avowry, and proceed. A sum of 77*l.* was paid into Court

be amended under the 3 & 4 Will. 4, c. 42, s. 24, although the plaintiff gave notice of his intention to oppose any amendment, and to rely on the variance.

by the plaintiff for three quarters rent of the premises to Christmas, mentioned in the avowry, and costs up to that time; and on a subsequent day, the plaintiff gave notice that he should oppose any amendment, and should rely on the variance. The cause was tried at the Devonshire assizes before *Tindal*, C. J., and the jury found that the rent was payable half yearly, and that the amount in arrear was 57*l.* 10*s.*, so establishing the yearly amount to be 115*l.*, and this finding was entered on the record.

Wilde, Serjt., and *Barstow*, now shewed cause against a rule which had been obtained by *Crowder*, to enter the verdict for the defendant on both issues, and to increase the arrears of rent by the amount of one quarter, or to amend the avowry by altering the allegation of a quarterly into a half yearly holding, on the ground that the plaintiff having paid money into Court on an avowry, by which a quarterly holding was alleged, was precluded from setting up a half yearly holding. It was now contended that this was a case in which the Court could not exercise any jurisdiction to amend. The statute, under which the amendment was proposed to be made, was the 3 & 4 Will. 4, c. 42, ss. 23 and 24. The 23rd section enacted, "That it shall be lawful for any Court holding plea in civil actions, and any Judge sitting at Nisi Prius, if such Court or Judge shall see fit to do so, to cause the record, writ, or document, on which any trial may be pending before any such Court or Judge, when any variance shall appear between the proof and the recital, or setting forth on the record, writ, or document on which the trial is proceeding of any contract, custom, prescription, name, or other matter, in any particular or particulars, in the judgment of such Court or Judge, not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some

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officer of the Court or otherwise." Sect. 24 of the act provided, "That the said Court or Judge shall and may, if they or he shall think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the Jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated upon such record or document; and notwithstanding the finding on the issue joined, the said Court, or the Court from which the record has issued, shall, if they think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action, or defence, give judgment according to the very right and justice of the case." The matter proposed to be amended here was not immaterial, but on the contrary, the questions, whether the holding was quarterly or half yearly, and whether the rent was 100*l.* or 115*l.* were the real questions in dispute; and, besides, the defendant was informed by the plaintiff of his intention to oppose the amendment.

Crowder was stopped by the Court.

TINDAL, C. J.—It appears to me that this case falls within the principle and spirit of the statute. The ground on which leave to amend is applied for here is, that the variance is immaterial to the merits of the case, and the misstatements are such as could not prejudice the party; but whether this was or was not a material part of the averment must depend on the course which was taken at the trial; and the only question there was, whether the holding was at 115*l.* or 100*l.* a year. The plaintiff's counsel never stated such an objection as this at all, but said that at the first part of the holding the rent was 115*l.*, and that in 1834 a new arrangement was made, by which it was reduced to 100*l.*, and so far was the plaintiff from

being prejudiced by anything which appeared on the record, all the evidence which could at all support his case was produced. The main question, therefore, being the amount of rent, he is now endeavouring to avail himself of an objection in point of form, and which does not affect the merits at all, for the payment of three quarters rent into Court shews a consciousness to exist in his own mind that the holding was quarterly, and not half yearly. Now the notice which was delivered could not prejudice the plaintiff, because it had the effect of putting him on his guard, that an application for an amendment would be made in case of a variance; and the question now is, whether it ought, in sound justice, to be permitted to be made. I think that we should allow the amendment, but on payment of costs.

Rule absolute.

WHITTAKER and Others v. MASON.

WILDE, Serjt., obtained a rule calling on the plaintiff to shew cause, why all proceedings in this action should not be stayed, the defendant having become bankrupt and obtained his certificate. It was an action brought by the plaintiffs to recover damages for a breach of contract, for not paying for certain books sold and delivered by bills of exchange, with security for their being paid.

The defendant pleaded, that, by the custom of the trade, he was not bound to give the security required, and he also pleaded non-assumpsit to a common count in the declaration upon an account stated.

The plaintiff replied *de injuriâ*, to the plea alleging the custom of the trade, and joined issue on the other plea. The replication was demurred to by the defendant, and judgment was given in his favour. Judgment upon the demurrer was signed in November, 1835, the action hav-

The plaintiff having sued under a contract for the purchase of books, and the defendant, before the trial of the action, having become a bankrupt, the plaintiff proved the price of the books under the fiat; but the defendant having obtained his certificate, was held to be still entitled to proceed to trial by proviso.

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ing been commenced on the 28th of January in the same year, but all proceedings for the recovery of the defendant's costs on the demurrer were stayed, until after the trial. The plaintiffs had given notice of trial for the sittings in Michaelmas Term, 1835, but the notice was countermanded on judgment on the demurrer being obtained by the defendant, and in the December following, the defendant became bankrupt. The affidavit in support of the rule in which these facts were alleged, then went on to state, that the plaintiffs had proved their debt amounting to 261*l.* 4*s.* 2*d.* under the fiat, and that they had since received a dividend out of the estate, and the defendant had obtained his certificate. An offer was made in November 1837, on the part of the defendant, to stay all proceedings in the action, the plaintiffs entering a nolle prosequi and paying the costs of the demurrer; but these terms having been declined, the defendant's attorney gave notice that he should proceed to the trial of the cause by proviso, and the present rule was in consequence obtained.

Kelly now shewed cause, and submitted that the present proceeding was not one within the 6 Geo. 4, c. 16, s. 59, which contemplated those cases only where plaintiffs had properly brought actions which they could maintain. The present, however, was an application on the part of the defendant's attorney, the object of which was to recover the costs to which he would be entitled in the event of the defendant obtaining judgment in the action. The statute in question provided, that where a party proved his debt under a commission, it should be taken to be an election on his part not to proceed by action.

Wilde, Serjt., in supporting the rule, contended, that the plaintiff, having made his election to proceed under the commission, ought not to be forced on to trial by such

means as were proposed to be adopted here. The only damages which the plaintiff could now recover would be the price of the books, but he had already received a dividend on them. The real object, then, of the defendant's attorney, was only to obtain the costs of the interlocutory judgment on this demurrer. It was the attorney who was now before the Court, and his object was to go on without the permission or direction of his client. The defendant had now no interest whatever in the cause, and the Court would not sanction such a course, as an attorney forcing on the plaintiff under such circumstances.

TINDAL, C. J.—We have no right to interfere with defendants in ordinary cases, and prevent them from taking down a cause by proviso, for that is the mode by which it has been determined that a plaintiff shall be prevented from keeping a cause hanging over the head of a party for an indefinite time. The only questions therefore are, whether the case falls within the Bankrupt Act, and whether it may be said that the plaintiff has made his election; and, secondly, whether it is the defendant who now is before us. On the first point, as to whether this case is within the statute, I must say that I feel great difficulty in saying that it is a case contemplated by the act. It appears, that the action was commenced in January, 1835, and the declaration contained a special count to recover damages for not giving bills of exchange, according to conditions of sale, and if it had gone down to trial immediately, it does not appear to me that the plaintiff would, in strictness, have been entitled to recover any more damages than the amount of the bills; at the same time, it is by no means certain that the jury would have given damages for the amount which the books were worth, when the bills became due. Now, the plaintiff, when the defendant became bankrupt, appeared before

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the commissioners and proved the amount of his debt, which, it appears by the custom of the trade, was then due; but I do not see that that was proving the demand in respect to which this action was brought.

The next question is, whether the defendant is in reality before us, and there is no affidavit produced that he is the person who now puts the process of the Court in motion. Supposing the defendant does not appear to have authorised this step to have been taken, the attorney is putting him in a position likely to bring him into a difficulty; because, supposing a verdict should pass against him, there would be a remedy against him who was so lately become a certificated bankrupt, while, on the other hand, in the event of the termination of the suit being unfavourable to the plaintiff, he has to pay all the costs. It would be most expedient, then, for us to take the middle course, which will best meet the justice of the case. Costs are already due from the plaintiff on the demurrer, and, I think, that on their being paid, a *stet processus* should be entered; but if this is not acceded to, the rule must be discharged.

Rule accordingly.

PARSONS v. PITCHER.

Where the plaintiff has brought an action against the defendant to recover a sum of 16*l.*, and the defendant offers him 13*l.* in satisfaction of his demand, which he refuses to take, and subsequently, on his proceeding with the action, the defendant obtains an order to pay 11*l.* 8*s.* into court, but neglects to proceed on it, in consequence of which the plaintiff takes subsequent steps, but eventually, on the money being paid into court, he accepts it, the plaintiff is entitled to costs only up to the time at which the order was made.

WILDE, Serjt., shewed cause against a rule which had been obtained by *W. H. Watson*, for a review of the taxation of the costs in the action. It was an action brought to recover a sum of 16*l.*, and it was commenced in August last, but the defendant having offered to settle the action for 13*l.*, which the plaintiff refused to accept, no step was taken until the 21st October. A summons was then taken out by the defendant, calling on the plaintiff to shew cause

for the rule. The defendant obtained an order to pay 11*l.* 8*s.* into court, but neglected to proceed on it, in consequence of which the plaintiff took subsequent steps, but eventually, on the money being paid into court, he accepted it, the plaintiff is entitled to costs only up to the time at which the order was made.

why, on the payment of 11*l.* 8*s.*, he should not discontinue the action, or why, if he should refuse to accept that sum, he should not be deprived of all subsequent costs; and on the 27th of the same month an order to that effect was obtained. The defendant, however, neglected to act upon it, and on the 6th November the plaintiff wrote to him, and gave him notice that if he meant to obey the order he should pay the money into Court, but that if he did not immediately pay in the money, further proceedings would be taken. No answer was returned to this, and the plaintiff, in consequence, delivered a declaration on the 9th of the month, and then, on the 13th, the defendant paid in the money. The plaintiff took it out and stayed proceedings, and immediately afterwards went before the Master to tax the costs, and costs were allowed as if the order had not been obtained. It was now contended that the plaintiff, by the neglect of the defendant, had been compelled to proceed with the action, and that, therefore, the Master was right in allowing him his costs up to the time of the money being paid into Court.

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W. H. Watson, in support of the rule, submitted that it must be made absolute for a review of the taxation of the costs, those only being allowed which were incurred up to the time of making the order. The plaintiff's conduct in the action must be considered vexatious in his not having accepted the sum originally offered to him. *James v. Raggett* (a) was a case in which the marginal note was, "An action was brought for two separate sums of money, one of which the defendant offered to pay, with all costs to that time. The plaintiff's attorney, however, refused to stay proceedings on those terms, and the defendant paid that sum into Court; but the plaintiff afterwards finding that he could not support the action for the other part of

(a) 2 B. & Ald. 776.

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his demand, took the money out of Court and discontinued the action; the Court allowed the defendant his costs from the date of his offer to pay the sum paid into Court, and directed that the same should be set-off against the plaintiff's costs previously incurred." In the present case the plaintiff clearly refused, and the decision of the Court must therefore be governed by the case cited. *Marryott v. Clapp* (a), and *Willis v. Darke* (b), were cases to the same effect.

TINDAL, C. J.—I cannot distinguish this case from *James v. Raggett*, to which it is better that we should adhere. The bill of costs must, therefore, go back to the Master.

Rule absolute.

(a) Ante, Vol. 1, p. 701.

(b) 1 Tyr. & G. 503.

GREEN v. BOLTON.

A party suing in a superior court for the balance of an account, the original debt exceeding 5*l.*, but which has been reduced to 30*l.*, is not liable to costs, under the Tower Hamlets Court of Requests Act.

CHANNELL, on behalf of the plaintiff in this action, shewed cause against a rule which had been obtained by *C. C. Jones*, for entering a suggestion on the roll to deprive the plaintiff of his costs, and for the allowance of the defendant's costs to be paid by the plaintiff under the Tower Hamlets Court of Requests' Act, 2 Will. 4, c. 65, within the jurisdiction of which the defendant resided. The action, it appeared, was brought to recover the sum of 8*l.*, the balance of an account, but on the trial before the sheriff, the jury returned a verdict with 30*s.* damages only. A summons, having the same object as the present rule, was taken out before *Park, J.*, but was dismissed on the ground that it was not shewn, in the affidavits, that the defendant was liable to be warned and summoned to the Court of Requests; but a subsequent summons being taken

out before *Vaughan, J.*, an order was drawn up for the stay of proceedings until the present application should be made. The statute of 2 Will. 4, c. 65, was passed to amend the previous act of 23 Geo. 2, by which the Court was originally established, and by section 10 of the new enactment, an increased jurisdiction was given, the amount recoverable in the Court being altered from 40*s.* to 5*l.*, but it was provided that the commissioners should have no power to decide upon any debt, the balance of an account, if the original debt had exceeded 5*l.* in amount. There was also a provision reserving a concurrent jurisdiction with the superior courts where the amount of the debt exceeded 40*s.*, but was less than 5*l.* He objected, first, that the application was too late; and, secondly, that it was the duty of the defendant to put the defence on record, on which he now sought to ground the present objection; but the only point on which the Court gave any decision was the following: namely, that there was nothing in the language of section 10 of the new act which limited the operation of the statute to sums above 40*s.* and under 5*l.*, on which ground the rule had been obtained; but that, on the contrary, it provided that nothing in the recited act of Geo. 2, should empower the commissioners to decide in cases where the debt, having been above 5*l.*, had been reduced to a minor sum.

C. C. Jones, contra, submitted that if this construction were adopted, the 23rd section, by which the concurrent jurisdiction with the superior courts was reserved, would be useless. Section 10 of the statute 2 Will. 4, c. 65, must be taken to apply to those cases only where the sum really due exceeded 40*s.* in amount, and was less than 5*l.*, but where the sum recovered, as in the present instance, was less than 40*s.*, the law stood as it formerly did under the old act.

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TINDAL, C. J.—We are unable to put any construction on this act but that which is perfectly natural. The 10th section expressly provides that nothing contained in the recited act, or in that act, shall give the commissioners power to decide upon debts for any sums being the balance of an account originally exceeding 5*l*. That seems to exclude from their jurisdiction the balance of an account, being less than 40*s*. even; if it was originally more than 5*l*. Section 23 only provides that the superior courts shall have the same jurisdiction which they had before. The words seem to me so clear that I can put no other construction on them than that suggested on the part of the plaintiff.

The rest of the Court concurred.

Rule discharged.

BLISSETT v. TENANT.

When the date of the writ of summons is omitted in the issue, but is supplied in the writ of trial, the writ of trial will be set aside, with costs, for irregularity.

The objection is not waived by the defendant's appearing by his attorney at the trial, and allowing the cause to proceed, under protest.

WILDE, Serjt., moved for a new rule to shew cause, why the writ of trial in this action should not be set aside for irregularity, with costs. The alleged irregularity was, that the writ of trial varied from the issue, the date of the writ of summons being inserted in it, and omitted in the issue. It appeared, that the cause was tried before the Secondary on the 22nd of December, but before the jury were sworn, the defendant's attorney discovered the variance, and objected to the proceedings. The Secondary, however, expressed his opinion, that the trial must go on, and it accordingly proceeded, the defendant's attorney conducting the case of his client, but under protest. A verdict was eventually found for the plaintiff, with 1*l*. 1*s*. 6*d*. damages, the action having been brought to recover 2*l*. 2*s*. It was now contended, that the writ of trial must follow the issue, and that as a date was inserted

in it, which was not contained in the issue, there was a variance which was fatal. The objection was twofold; first, that the date of the writ of summons was omitted in the issue; and, secondly, that the writ of trial did not follow the issue. The case of *Worthington v. Wigley* (a) was precisely in point, and although there, the defendant did not appear to take any part in the proceedings, yet as the defendant's attorney here had acted under protest, there was no real difference between the cases. *Wight v. Perrers* (b) was also a decision in support of the application. In *Whipple v. Manley* (c) the Court set aside the trial, on the ground that the date of the writ of summons which was inserted in the writ of trial was inaccurate, and they ordered the writ to be amended. *Edge v. Shaw* (d) also had reference to the same point. In *Percival v. Connell* (e) the Court suspended the rule, in order that the plaintiff might amend; but although it was stated that the defendant appeared at the trial, it did not appear that he offered any objection to the proceedings. A defendant had no means of preventing the cause from proceeding, but when he allowed it to take the usual course under protest, he did all that was in his power, and on this ground therefore, no objection could be made. In *Holt v. Meddowcroft* (f) a common jury panel was returned, together with a special jury panel; but no special jurymen appeared, and although the defendant objected to it, the cause was tried by the common jurors; and Lord *Ellenborough*, in his judgment, there said, "What might have been the effect of the defendant's appearing at the trial, and making a defence, without any protest against trying the issue, it is unnecessary, at present, to

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(a) Ante, Vol. 5, p. 209.

(b) Id. p. 463.

(c) 1 M. & W. 432.

(d) Ante, Vol. 4, p. 189.

(e) 3 Bing. N. C. 877.

(f) 4 M. & Sel. 467.

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inquire, because we find the defendant did protest, and did all in his power to resist the proceedings. I cannot agree that it amounts to a consent on the part of the defendant, because being, as it were, tied to the stake and dragged on to trial, he endeavours to make the best of it." This opinion, then, was decisive, and must govern the Court in the judgment which they should give on this portion of the present case.

James shewed cause in the first instance.—He did not propose to contend that there had not been a non-compliance with the rules, but he should submit that the defendant had waived the objection, by accepting the issue without applying to have it amended, and that he could not now take advantage of his own neglect, and import the irregularity into the writ of trial. He might otherwise, in the same way, bring forward an objection to the declaration. [*Tindal*, C. J.—If you had gone on incorporating the irregularity in the writ of trial, it might be as you suggest, but by what right does the plaintiff alter the record?] The writ of trial was correct, and that was the important part, as from it the record was made up. There was a case decided in the Exchequer in the course of the present term, of *Farwig v. Cockerton* (a), which overruled several of the decisions which had been referred to on the other side. It was held there that a variance between the issue and the writ of trial might be amended at any time, and that decision amounted in fact, further, to an authority, that if a defendant attended the trial and fought for a verdict, notwithstanding he did so under protest, he could not afterwards take advantage of any merely formal objection to set aside the writ of trial. At all events, even though the rule should

(a) Ante, p. 337.

not be carried to this extent, the defendant would be entitled to no more than an amendment, and that he might have obtained at the trial: *Cox v. Painter* (a). This might be derived also from a proviso, which appeared in the course of the New Pleading Rules, H. T. 4 Will. 4 (b), which was, "Provided that in case of non-compliance, the Court or a judge may give leave to amend." The defendant, besides, could not be prejudiced by the error, for he knew the date of the writ of summons, and if the omission of that date in the issue had been of any importance to him, he would have taken advantage of it at the time, and it might then have been supplied. Instead of his doing so, however, he suffered the cause to proceed; the trial having taken place, it was too late to object. The date of the writ of summons was not an integral part of the record. [*Tindal*, C. J.—It may be in a case where the cause of action may be shewn to have accrued after the date of the issue of the writ.] In order to render the decisions uniform, the Court would not grant this rule. [*Park*, J.—Is it any where said that the writ of trial must follow the issue?] It was not. The irregularity was entirely in the issue and not in the writ of trial. In the form given, it was directed that the date of the writ of summons should be inserted, and that the declaration should be recited; but it surely was unnecessary, where an error had crept into the issue, to carry that into the writ of trial.

Wilde, Serjt., in reply submitted, that the case of *Farwig v. Cockerton* was quite contrary to all precedent, and against the general rule of practice, and that the Court, therefore, would not act upon it. The writ of trial was, to the Secondaries' Court, that which the nisi prius

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(a) 7 Carr. & P. 767.

(b) Ante, Vol. 2, p. 327.

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record was to one of the superior Courts, and the only character it had was that of accuracy in faithfully setting forth that of which it purported to be a copy, and it ought to give a transcript of the proceedings, but if it varied in a material part, it lost its proper character. The issue was a notice to the defendant of that which the record was to be—it was a copy of the roll, and the writ of trial ought also to be a copy of the roll. The non-appearance of the defendant was shewn in *Worthington v. Wigley*, and that case, therefore, was more decisive in favour of the application, for it shewed that the defendant did not care how that case went, while here the defendant was alive to his rights, and gave notice of his objection.

TINDAL, C. J.—According to the best of my judgment, the case of *Worthington v. Wigley* has been rightly decided, and I am not prepared to depart from that authority. It is exactly in point, except that the defendant did not there appear at the trial, while here he did appear, and he allowed the cause to go on, under a protest, however, against the proceedings. I think it would be extremely hard, and most injurious to the purposes of justice, if, in many causes tried, the defendants were obliged to sustain the effect of a speech from counsel to the jury, without any answer being allowed them but the law of the case, and we cannot think, therefore, that an appearance under protest can make any material difference in the case; or is it an answer to an objection such as that which is now made. The issue is directed to be in a particular form, and it is to begin by the recital of the writ of summons, and the date of the declaration, and the subsequent proceedings. The writ of trial, which is the same as the record in a case at nisi prius, ought to be an incorporation of the various proceedings. Now, when we look at the issue here, we see that there is no date of the issuing

of the writ of summons. I agree, that if the party had merely persisted in copying the issue into the writ of trial, it would have been too late to complain of the irregularity, because the answer would have been, "This is a transcript of the issue;" but here the plaintiff has thought proper to put into this writ, by which the cause is to be tried, a statement which is inconsistent with the former part of the proceedings. The parties ought to go to a Judge at chambers, or to the Court, before they take the liberty of amending the record, and as they have not done so the rule must be absolute.

PARK, J.—I am of the same opinion. With regard to the protest, I should presume to differ from the judgment in the Court of Exchequer, because, although in the case decided by Lord *Ellenborough*, there was some difference from this case, yet I cannot lightly differ or depart from the strong language used by him there.

VAUGHAN, J.—I see no reason to depart from the decision in the case of *Worthington v. Wigley*, and I think there is no subject on which our decisions should be more positive than on altering the record, and we ought to set our faces most decidedly against the principle of permitting such alterations to be made without the permission of the Court or a Judge. It is said that we ought to follow the rule laid down in the Court of Exchequer, with regard to the protest, but it appears to me that such a course would be attended with the greatest inconvenience. One great object which we always have in view is, to diminish the expenses of suitors, but this object would be defeated, if we were to adopt the authority contended for, and the effect would be that it would lead to great cost being incurred. Here, however, the defendant having done all he could to urge his objection, he was not

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to allow himself to be baited, as it were, without making any answer.

BOSANQUET, J., concurred.

Rule absolute, with costs.

BLISS v. HAY.

CASE for a nuisance.—The declaration alleged that the plaintiff, before and at the time of committing the grievance, was lawfully possessed of a certain messuage or dwelling-house, and that the nuisance complained of arose from the defendant's carrying on the trade and business of a candle maker in contiguous premises.

A plea of user for three years before the plaintiff became possessed of his premises, is not a sufficient answer to an action on the case for a nuisance in carrying on the business of a candle maker.

Plea—that the defendant was possessed of his premises for three years before the plaintiff became possessed of the messuage or dwelling-house named in the declaration, and before he or any of his family dwelt or resided in the said messuage or dwelling-house; and that, during that time, the defendant had carried on the trade of a candle maker, in the same manner and form and degree as he did afterwards at the time complained of by the plaintiff in his declaration; and that having so lawfully enjoyed his premises, factory, and business, before the plaintiff became possessed, or came to reside or dwell in his said messuage or dwelling-house, he still lawfully ought to enjoy the same.

Demurrer and joinder.

Butt, in support of the demurrer.—The plea was entirely disposed of by the decision in the case of *Elliotson v. Feetham* (a). There, in an action for a noisy nuisance, the declaration alleged that the plaintiff was possessed for

(a) 2 Bing. N. C. 134.

the residue of a term of a messuage, and that he was disturbed in its enjoyment by the alleged nuisance; plea, that the defendants were possessed of their workshop and manufactory, in which the nuisance was alleged to have been committed, for ten years before the plaintiff became possessed of his said term of and in the messuage or dwelling-house: replication, that the term, the residue of which was held by the plaintiff, was created a long time, to wit, four years, before the defendants were possessed of their workshop and manufactory in the plea mentioned. The Court, in giving judgment, said, that a user for twenty years, at least, should have been alleged by the defendants. The plea in that case, it was submitted, was much better than that which had been pleaded by the present defendant. The simple question was, whether, because a man chose to set up a nuisance one day before another went to reside near him, the plea of user would be any defence to the action?

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Hoggins, in support of the plea.—There was no authority in the books that a man going to a nuisance had a right to complain of it. It was said in Comyn's Digest (*b*), that an action would lie: "If a man erect any thing offensive so near the house of another, that it becomes useless thereby; as a swine sty, or a lime kiln, or a dye house, or a tallow furnace; but if he be a chandler, *quære?*" The business of a tallow-chandler was a lawful one, and if the defendant was already established in his trade, and the plaintiff chose to go to him, he must take the consequences of his own act, and the defendant should not suffer from it.

TINDAL, C. J.—Stopping a watercourse would be a nuisance, for if the defendant were a little higher up the stream than the plaintiff, could he stop it? Would not

(*b*) Tit. Action on the Case for a Nuisance, A.

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the plaintiff be entitled to the water? In this case the defendant sets out that the messuage of the plaintiff is contiguous to his own, and all he says in his plea is, that he had held his premises, and had carried on his business for three years before the plaintiff came there. But that user for three years would not give him any right as against the owner of the plaintiff's house. He says he carried on the business and does so still, but it appears to me that that is no answer in law, because when the plaintiff came to his house he was entitled to all the rights appurtenant to it, and he is entitled to good air at common law. The defendant cannot support his plea, unless, from the length of his user, it is to be presumed that he made a bargain with the original owner of the house now occupied by the plaintiff. The plea in this case, therefore, I think, is not to be distinguished from that in *Elliotson v. Feetham*.

PARK, J.—In the case which was cited by Mr. *Butt*, as it is reported in 2 Scott, there are a great many references given in which the same principle had been supported, and the Lord Chief Justice, in his judgment, took precisely the same ground which he has taken here. He said, “Where a man purchases a lease, he takes with it all rights incidental to it;” and then he said, “Twenty years user would legalise the nuisance.” Here, however, there is no twenty years user set up, and the plea is no answer to the action.

VAUGHAN, J.—I am of the same opinion. A business may be a nuisance or not according to the place at which it is carried on.

BOSANQUET, J.—If the defendant sets up a right, he must shew that he has acquired it; but here, he only sets up the possession of the premises a very short time before the plaintiff comes to his property.

Judgment for the plaintiff.

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PETERSDORFF, on a former day, obtained a rule, calling on the plaintiff to shew cause why the defendant should not be allowed his costs under the statute 43 Geo. 3, c. 46, s. 3, on the ground of his having been arrested for a sum of 28*l.* 9*s.*, without reasonable or probable cause. The rule had been granted on an affidavit made by the defendant's attorney, and he stated that the defendant had been arrested for a sum 28*l.* 9*s.*, and that, having given bail to the action, the plaintiff on the 24th of October last delivered a declaration, which contained a count on a bill of exchange for 17*l.* 9*s.*, a count for goods sold and delivered, and also a count on an account stated. By his particulars, he claimed 11*l.* on the second and third counts. The deponent having been informed by the defendant that he had had no dealing with the plaintiff in the way of business for more than six years, pleaded as to the first count in the declaration, no notice of dishonour of the bill; as to the second and third counts, the Statute of Limitations. The cause went down for trial, and the jury found for the plaintiff on the first count, but the second and third counts were abandoned. The affidavit in conclusion alleged, that the defendant had incurred considerable expense in respect of the second and third counts, and that no goods had been delivered to him, in accordance with the particulars of demand.

Wilde, Serjt., now shewed cause, and pointed out that no affidavit was made by the defendant himself, although the whole of the true facts must have been within his knowledge, but that the attorney was put forward, whose acquaintance with the circumstances must be limited to what the defendant might choose to impart to him;

An application being made, under the statute 43 Geo. 3, c. 46, s. 3, by the defendant for his costs, and it being shewn that he was arrested for a sum of 28*l.*, which was made up of two amounts of 17*l.*, claimed on a bill of exchange, and 11*l.* for goods sold, and at the trial a verdict being returned for the plaintiff for the first mentioned sum, but the defendant having pleaded the Statute of Limitations, the claim for the second sum was abandoned, but it appearing, on an affidavit sworn by the plaintiff, that the defendant had frequently admitted the amount for the goods sold to be due:—*Held*, that the defendant was not entitled to his costs.

In such an application, it is for the *defendant* to prove the want of reasonable and probable cause for the arrest.

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and by these means the date of the transaction in the particulars was traversed. It was submitted, however, that it was the duty of the defendant to make out a case to induce the Court to grant him the relief which he sought, but that the facts alleged were insufficient for that purpose. An affidavit sworn by the plaintiff was also produced, in which it was stated that the deponent had frequently called on the defendant for payment of the sum of 11*l.* due for goods sold, and that he never denied that it was owing, but always promised to pay. These applications had been made on the defendant being casually met in the street, and his address was not ascertained until very shortly before the commencement of the action, when he was followed home by the deponent. It was not the duty of the plaintiff, before he commenced his action, to look round and consider every unjust or dishonest defence which the defendant might set up, but under the circumstances, the defendant having so frequently admitted the money to be due, and he himself being perfectly aware of the justice of his demand, he was entitled to proceed for the full sum of 28*l.* 9*s.* The defendant could not maintain an action for a malicious arrest, and the present application ought not to prevail. *Spooner v. Danks* (a) was a strong case in favour of the plaintiff, and it was clear from it that the burden of proof lay on the defendant. The defendant here rested entirely upon a mere technical defence, which was against the real justice of the case, and he ought not to be permitted to have the advantage of that which was his own act.

Petersdorff, contra, submitted that the facts sworn to on behalf of the defendant, were sufficient to establish a case of want of reasonable and probable cause for the

(a) Ante, Vol. 1, p. 232.

arrest for the full amount. The defendant, in the answer which he set up to the claim for goods sold, was acting legally and properly under the provisions of the statute, which was enacted for the benefit of defendants, and his defence could not be said to be dishonest or unjust. The plaintiff well knew that he could not give the admissions in evidence, and he had no right therefore to arrest the defendant, being fully aware that he could not support his claim. *Griffiths v. Pointon* (a) was a case directly in point, in favour of this proposition. The marginal note was "a party is not warranted in arresting another for a debt, of which he has not, at the time of making the arrest, some evidence besides his own personal knowledge of its existence; and therefore a plaintiff arresting a defendant for a large sum of money, and having at the arrest only evidence as to a small portion of the amount, was held to be liable to costs under the 43 Geo. 3, c. 46, s. 3, although at the time of the trial some evidence of a subsequent acknowledgment by the defendant was given." [*Tindal*, C. J.—The plaintiff in the present case need not have known, that it was the defendant's intention to set up the Statute of Limitations as a defence, and it is possible that he had abundant proof of the delivery of the goods.] That suggestion could not fairly influence the Court, for if it did, the statute on which this application was founded would be useless, in fact, void. The judgment in the case cited, besides, was extremely strong, that attorneys should caution their clients how they ventured on bringing actions which they could not support by legal evidence. Here, there was no legal proof, and the case must be decided by analogy to that which had been cited. *Ballantine v. Taylor* (b) however, appeared precisely to meet the suggestion of the Lord Chief Justice,

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(a) 2 Nev. & M. 675.

(b) 1 N. & P. 219.

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for there, the defence set up was infancy, the effect and nature of which was precisely similar to that of the Statute of Limitations, and yet the Court held that the act applied. It was sufficient that the defence was a legal one, and the Court then said, "It has always been held that the damages recovered by the plaintiff are *prima facie* evidence of the sum due from the defendant;" and in a subsequent part of the judgment it was said, "The conduct of the defendant certainly cannot be approved of, but it is well that the parties should know, when a debt amounts just to 20*l.*, the risk they run in making an arrest." *Ashton v. Naull* (a) and *Nicholas v. Hayter* (b) were also in point. The plaintiff's case rested only on his own affidavit, but even that went to shew that he was fully aware of the want of legal proof of the admissions, which he alleged the defendant had made to him.

TINDAL, C. J.—I think the defendant has not brought himself within the operation of the statute. It is clear, from the provisions of the act, that the proof of want of reasonable and probable cause for the arrest lies on the defendant, and it would be absurd to suppose that the plaintiff is bound to shew that he had good grounds for proceeding. In this case, the plaintiff's demand has been reduced below an arrestable amount by the plea of the Statute of Limitations. Now, I do not think it is necessary to lay down any general rule here, but the ground on which the Court come to their decision is, that the defendant has, by his own conduct, decoyed and lulled the plaintiff into a belief that he did not intend to take advantage of the statute. I will not stop to inquire how far the defence set up is a moral one, but when we find it

(a) Ante, Vol. 2, p. 727.

(b) 4 N. & M. 882; S. C. 2 Ad. & El. 348.

sworn in the plaintiff's affidavit, that the defendant frequently promised to pay, admitting the money to be due, how could any one suppose that the Statute of Limitations would be pleaded in bar to the account? I am aware that the statute requiring the admissions to be in writing takes away from the plaintiff the power of giving the conversations in evidence; but the question is, whether he had a reasonable idea and belief that he was entitled to proceed? The case is distinguishable from that of *Griffiths v. Poynton*, for there, the only evidence of the plaintiff's claim was his own personal knowledge of its existence, and he was quite sure that he would never be entitled to give that in evidence, and therefore, in that case, there was no reasonable and probable cause. *Ballantine v. Taylor* stood on its own peculiar circumstances, but the opinion of the Court seems rather to admit the principle on which we are deciding this case. It is not necessary to lay down any rule; but I may say, that when the debt appears to be really due, is asserted by the plaintiff to be so, and it is not denied by the defendant, and when the cause of holding the defendant to bail may be said to depend on the defendant's own conduct, the case, it appears to me, does not come within the statute. I am of opinion, therefore, that the rule must be discharged.

PARK, J., concurred.

VAUGHAN, J.—I think that the Court would not properly administer justice if they were to carry the construction of this act to the extent contended for by the counsel for the defendant. The case appears to me to rest on its own circumstances; and it is evident, from the words of the statute, that the object of the legislature was to give the Court the power of judging of all the facts of a case, and it is for the defendant peculiarly to shew all the circumstances necessary to make out the want of reason-

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able and probable cause. Now, here the plaintiff's affidavits shew that he had grounds for believing that his demand upon the defendant was a good one, for the defendant's conduct lulled him into an idea that the Statute of Limitations would not be pleaded. It is different from a case of a release, because that would be an extinguishment of the debt, but here, the debt is only barred by reason of the evidence necessary to prove it not being in writing. We should be doing injury to the parties if we were to make this rule absolute.

BOSANQUET, J.—I am of the same opinion. It is the duty of the defendant, who seeks to recover costs under this act, to bind the Court to grant his application, by shewing a want of reasonable and probable cause for the arrest, and the act provides that this shall be decided on affidavit. It has been justly complained in this case, that the defendant has made no affidavit, and it has been equally unjustly complained, that the plaintiff has made an affidavit, for he was at liberty to do so under the provisions of the act. Then, it appears, that the defendant has repeatedly promised that he would pay the debt; and, therefore, when the plaintiff knew it to be due, the defendant admitting that he was liable for it, he might well suppose that the defendant would not set up the Statute of Limitations as an answer to the action. This case must stand upon its own grounds; and, therefore, without laying down any general rule, I think the defendant has not brought himself within the act.

Rule discharged.

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BURTON v. CAMPBELL.

PRICE had obtained a rule calling on the plaintiff to shew cause why he should not be disallowed his costs of suit, and why the Court should not award that he should pay the defendant the costs which he had incurred in defending the action; and also why he should not pay the costs of this application. The rule was granted on affidavits made by the defendant and two other persons, on the ground that the former was liable to be warned and summoned to the Court of Requests established in the Hundred of Blackheath, under the 6 & 7 Will. 4, c. 120, the debt being under 5*l.*, to which amount, under the 21st section of the act, the commissioners were empowered to "decide and determine all disputes and differences between party and party in all actions or causes of debt, &c." The defendant, in his affidavit, described himself as "of the Mitre Tavern, Greenwich, in the Hundred of Blackheath," and stated that he had been served on the 1st of November with a copy of a writ of summons, which was annexed, sued out at the instance of the plaintiff, and which, by an indorsement, claimed 4*l.* 2*s.* 5*d.* debt, and 1*l.* 8*s.* costs, while he was accidentally in Fleet-street; but that he (the defendant) before and at the time of the issuing of the said writ, was wholly resident at the above tavern in Greenwich, and was liable to be warned and summoned to the Court of Requests for the Hundred of Blackheath, and that the plaintiff well knew of his said residence. The other affidavits were in corroboration of this statement of the defendant, and alleged further, that the defendant had gone to reside at Greenwich on the 1st of October, and that the fact was subsequently communicated to the plaintiff by one of the deponents, on his going

Under the Blackheath Court of Requests Act (6 & 7 Will. 4, c. 120), when, in an affidavit, the defendant describes himself as of "the Mitre Tavern, Greenwich, in the hundred of Blackheath," and subsequently swears that "before and at the time of the issuing of the writ in this action by the plaintiff, he was wholly resident at the above tavern," there is sufficient proof of his residence within the jurisdiction of the Court of Requests, in order to entitle him to move to deprive the plaintiff of costs, the debt being under 5*l.* in amount.

Where, in the affidavits produced on the motion, there is no allegation of the amount of the debt for which the action is brought, but the copy of the writ of summons, with which the defendant was

served, is annexed, indorsed that the plaintiff claims 4*l.* 2*s.* 5*d.* debt, that is sufficient proof of the action being brought for a sum "not exceeding 5*l.*"

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to him to endeavour to make some arrangement on behalf of the defendant with respect to the debt for which this action was brought. The 74th section of the act provided, "That if any action or suit for any amount recoverable in the said Court of Requests shall be sued or prosecuted in any of His Majesty's Courts at Westminster, or elsewhere, out of the said Court of Requests, and it shall appear to the Judge or Judges of the Court in which such action or suit shall be tried, that at the time of commencing such action or suit, the defendant was within the jurisdiction of the said Court of Requests, and was liable to be warned and summoned before the said court for such debt or demand, then and in such case the said Judge or Judges shall not allow to the plaintiff or plaintiffs any costs of suit, but shall award the said plaintiff or plaintiffs to pay such costs to the defendant or defendants as such defendant or defendants shall justly prove, before such Judge or Judges, that he or they hath, or have incurred, and been put to in the defence of such action or suit."

Arnold, now shewed cause, and produced an affidavit made by the plaintiff, who swore that the action was brought for a sum of money due from the defendant for board and lodging, and that from information which the deponent had obtained, he believed that the defendant, on quitting his house, had gone to reside at the Johnson's Head Tavern, Bolt Court, Fleet-street, and that he had continued to live there until the 1st of November, as this deponent was informed by the landlord, and believed, on which day a copy of the writ of summons in this action was served on him in a bed-room in that house. And it was further alleged, that the defendant pleaded in person, and delivered a plea, bearing date the 4th of December, indorsed "Cambell, Burton-street, St. Pancras." It was submitted that upon the conflicting statements in the

affidavits, the Court would consider themselves bound to discharge the present rule. The defendant, besides, did not clearly shew that he was entitled to the assistance of the Court. The 28th section of the statute, provided that it should be lawful for any person who should have any debt or demand, owing or due to, or claimed or demanded by such persons, and for which debt or demand he should claim any sum of money from any person "residing, inhabiting, or being within the said hundred, or keeping or using any house or warehouse, or employed, working, or seeking a livelihood, or usually trading or dealing" within the said hundred, to apply, &c. Now the defendant ought to make out in absolute and positive terms, that he was within one of these provisions of the statute, and should swear so in distinct words. *Newton v. Peacock* (a) was an authority in support of this general doctrine, and *Skinner v. Davis* (b) was also a decision in point.

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TINDAL, C. J.—The defendant describes himself as of the Mitre Tavern, Greenwich, in the Hundred of Blackheath, and swears that at the time of the issuing of the writ he was wholly resident there. The 74th section of the act requires that it should be made out to the satisfaction of the Court, that the defendant was within the jurisdiction, and that follows by necessary implication from the words of the affidavit.

Arnold then objected that there was no distinct allegation that the sum for which the action was brought, was "not exceeding 5*l*."

TINDAL, C. J.—The copy of the writ of summons is annexed to the affidavit, and the amount is shewn to be 4*l*. 2*s*. 5*d*. I think that is sufficient.

(a) Ante, Vol. 1, p. 677.

(b) 2 Taunt. 196.

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Arnold then proceeded to argue on the affidavit, that the rule must be discharged.

Price, contra.

TINDAL, C. J.—The only question here is, whether it appears to the satisfaction of the Court, that the defendant was, at the time of the issuing of the writ, “residing, inhabiting, or being” within the jurisdiction of the Court of Requests, and liable to be summoned thereby before the Commissioners. Now, upon the defendant’s affidavit, it is positively sworn, that he was “residing at the Mitre Tavern, Greenwich, before and at the time of the issuing of the writ of summons.” Then is there any thing sworn on the part of the plaintiff, which goes to deny this? There is not; for although there is an allegation that the defendant was living at the Johnson’s Head, yet that is only upon information, and the party who gives the information does not make any affidavit. The rule must therefore be discharged.

PARKE, J.—The word “being” in this statute is a very awkward one for the plaintiffs, and although merely passing through the jurisdiction would not, I think, be sufficient to bring a person within its meaning; yet sufficient is sworn here by the defendant, without any contradiction by the plaintiff, which can be depended upon, or taken as such, to induce the Court to make the rule absolute.

VAUGHAN, J. concurred.

BOSANQUET, J.—The residence of the defendant at the Johnson’s Head is only sworn to from information, and not from the plaintiff’s own knowledge.

Rule absolute.

1833.

DOE *d.* WRIGHT *v.* ROE.

BAYLEY moved for a rule for judgment against the casual ejector. The affidavit stated that the deponent, on the 9th January, had gone to the residence of Edward Price, the tenant in possession, and found the front door closed. He knocked at the door, and at length a female came to the window, whom he acquainted with the object of his call. She at first said that the tenant was not at home, but subsequently contradicted herself in this statement, and deponent afterwards, on the same day, served a copy of the declaration and notice, by delivering the same to the same person and explaining them to her, and he afterwards conversed with her on the subject of this action, when she said that she knew what it was, for that Mr. Wright (the lessor of the plaintiff) had been trying to effect service before, but could not. The deponent afterwards affixed a copy of the declaration and notice on the door of the premises.

TINDAL, C. J.—The female was the only person seen, and she may have made a mistake in saying that the tenant was at home.

Bayley submitted that the second conversation which took place would be sufficient to induce the Court to grant a rule to shew cause.

TINDAL, C. J.—But the same difficulty will still arise. However, as I am inclined to think there has been something like trickery, you may take a rule nisi.

Bayley subsequently applied to make the rule absolute. His affidavit now alleged the female to be the servant of the tenant in possession, and stated that the rule nisi had been

In ejectment for a close of land, proof of service of a copy of the declaration and notice, at the house of the tenant in possession, on a female, who, on the papers being explained to her, says she knows what they are, for that the lessor of the plaintiff had already been endeavouring to effect service, but could not, and by sticking another copy on the door of the house, is sufficient for a rule nisi for judgment against the casual ejector; and when the affidavit of service of the rule states the same person to have been served in a yard attached to the tenant's house, and that she is his servant, the rule will be made absolute.

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served on her in the yard attached to the dwelling-house of the tenant.

TINDAL, C. J.—That will do. What does your affidavit say on the subject of the premises in dispute?

Bayley.—It is ejectment for a close of land, and the tenant lives very near to it.

TINDAL, C. J.—You may take your rule.

Rule absolute.

DOE d. GRAEF v. ROE.

Where ejectment is brought to recover possession of stables, service on the wife of the tenant, at his dwelling-house, is sufficient for judgment against the casual ejector.

BOMPAS, Serjt., moved for leave to sign judgment against the casual ejector. The premises for which the ejectment was brought, consisted of stables, and the service which had been effected was on the wife of the tenant in possession at his dwelling-house.

TINDAL, C. J.—That is sufficient service. Otherwise you would never be able to recover stables at all.

Rule granted.

DOE d. BARING v. ROE.

When the tenant in possession is a bankrupt, service on the messenger in possession of the premises and the bankrupt's goods under the fiat, and on the official assignee, is sufficient service on which to ground a rule for judgment against the casual ejector.

W. H. WATSON moved for a rule for judgment against the casual ejector. The declaration and notice were addressed to Henry Mann and Latimer West, on whom the service had been regular, and also to Charles Collins, John Palmer, and George Gibson, the assignees of George

under the fiat, and on the official assignee, is sufficient service on which to ground a rule for judgment against the casual ejector.

Sanders Heywood, the tenant in possession, who was a bankrupt. The affidavit on which he moved stated that the deponent had gone, on the 6th of January, to the premises, for the purpose of serving the tenant, and that he personally served an individual who represented himself to be in possession under a fiat of bankruptcy, issued against George Sanders Heywood. The deponent also subsequently personally served George Gibson, the official assignee. This, it was submitted, was sufficient without service on the other assignees being effected.

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 —————
 Doe
 d.
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TINDAL, C. J.—It seems reasonable, I think, that the rule should be granted.

Rule accordingly.

See Davidson v. Bohn. 5 L.R. 170.

HITCHCOCK v. WALTER, Clerk.

Reported also 5 L.R. 792.

THIS was an action of trespass, and the declaration alleged that the defendant had pulled up and taken and carried away, and converted to his own use two grave stones, two tomb stones, and two other stones, which were part and parcel of a monument erected to the honor and sacred memory, and placed over the grave of certain ancestors of the plaintiff, whose remains before, &c., had been placed in the said grave, but which, by the removal of the said tomb stones, grave stones, and other stones, had been left much exposed, &c. Plea, first, that at the time when, &c., the said tomb stones, grave stones, and other stones were not, nor were any of them the property of the plaintiff modo et formâ, and of this the defendant put himself upon the country. Secondly, that as to the pulling up, taking and carrying away the said tomb stones, grave stones, and other stones in the declaration mentioned, the plaintiff ought not to sustain his

Where the defendant has pleaded two pleas, on one of which issue is joined, and to the other there is a replication, and he rejoins, confessing the cause of action on that pleading, and the plaintiff demurs to the rejoinder, but the defendant, instead of joining in demurrer, gives notice that he does not intend proceeding on his second plea, the plaintiff will not be entitled to judgment on the whole record, but the Court


will grant a rule for striking out the pleadings demurred to.

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action, for before and at the time when, &c., the defendant was possessed of a certain close, to which the said tomb stones, grave stones, and other stones were affixed, and at the time when, &c., they were doing damage to the plaintiff, and to the grass, herbage, &c., growing in the said close, and that therefore he took up the said stones, and conveyed them a short and convenient distance, and then left them for the said plaintiff. Replication, to the first plea, similiter; and to the second plea, that the defendant converted and disposed of to his own use, the said tomb stones, &c. Rejoinder, to the replication to the second plea, confessing that the defendant had converted and disposed of the said tomb stones, &c., in manner and form as alleged. General demurrer, to the rejoinder, but the defendant, instead of joining in demurrer, gave notice to the plaintiff's attorney, that he did not intend to take any steps in respect of his second plea. The plaintiff, on this, signed judgment on the whole record.

R. V. Richards now moved that this judgment might be set aside for irregularity, with costs. It was submitted that the plaintiff clearly had no right to sign judgment on the whole record, for there was already an issue regularly joined on the first plea, traversing the plaintiff's possession, and which went to the whole declaration. The case should have been treated as if there had been judgment on the second plea, and the issue which was joined should have been left to be tried. The defendant surely ought not to be in a worse situation than he would have been in if he had never pleaded the second plea at all. No analogy existed between this case and one which might have arisen before the statute of double plea, (4 Anne, c. 16). If there had been only one plea, and the party had refused to continue, judgment might have been signed; but there were two pleas, the first of which, on

which issue was regularly joined, went to the whole declaration. The plaintiff was, doubtless, entitled to judgment on the second plea, but the first plea was material, and was not disposed of. The plaintiff's proper mode of proceeding would have been to put himself in the same position, as if there been joinder in demurrer, and judgment in his favour.

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 HITCHCOCK
 v.
 WALTER.

Peacock opposed the rule, in the first instance. The case of *Spooher v. Brewster* (a) was taken as an authority on which the declaration was drawn; and the plaintiff was right in signing judgment. At the time when pleading was carried on viva voce in open Court, the parties appeared personally on the return of the writ, when, if the plaintiff desired to have time, it was given to him; but if the plaintiff declared, the defendant came in; and if he confessed the action, judgment was given accordingly; and if the defendant did not appear, judgment was given in like manner. [*Tindal*, C. J.—You will find it difficult to point out a declaration of that time containing two counts.] The defendant here not having joined in demurrer, it amounted to a discontinuance or default, and the judgment was rightly signed, as the practice formerly permitted it to be signed, if the defendant did not come in. Judgment given against a defendant for a default after plea pleaded, was a judgment by nihil dicit, for he would be taken to have waived all his former pleadings, and a writ of inquiry would have been awarded; so here the plaintiff could only sign judgment for the defendant's default. [*Tindal*, C. J.—Why could not the plaintiff sign judgment as to that particular part of the pleading to which there was a demurrer? We frequently have judgment on demurrer on a single plea.] Here there was no issue

(a) 3 Bing. 136.

1838.
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joined in law, and the plaintiff could not take the opinion of the Court on the rejoinder. The mode of confessing here taken was quite a novel practice, and it was sought by its adoption to save the expense of confession, and of the retraxit of the plea: 1 Tidd's Practice (*a*). There was no such judgment known in law as a judgment for want of a rejoinder. In *Petrie v. Fitzroy* (*b*), the Court held that if the defendant did not rejoin, the plaintiff might strike out the previous pleadings, and enter judgment as for want of a plea, and the neglect to rejoin was therefore considered as an abandonment of the plea. This practice was derived from that which formerly existed, by which, if the defendant omitted to go before the Court, judgment was signed for want of a plea. It surely could not be contended that the plaintiff was not entitled to any judgment.

TINDAL, C. J.—We are not prepared to go so far as that, because you might have judgment of nihil dicit quoad hoc. You had better have applied to the Court for a rule to strike out the plea, because you certainly have signed a larger judgment than you are entitled to. The doctrine for which you contend existed long before the statute of Anne, and it will hardly now apply. The proper course now will be for the judgment to be set aside, but at the same time, I think the pleadings demurred to should be struck out, neither party paying any costs.

Rule accordingly.

(*a*) Page 559, Ed. 9.

(*b*) 5 T. R. 152.

1838.

DOE *d.* DAVIES *v.* ROE.

OGLE, on the 19th of January, moved for a rule for judgment against the casual ejector. The motion should have been made within the first four days of Term, *Doe d. Lawford v. Roe (a)*, but it was hoped that under the circumstances, a rule nisi would be granted. The attorney had been directed to bring the action, but had neglected to instruct counsel in time to move for this rule according to the practice of this Court. This omission was entirely through inadvertence, and the lessor of the plaintiff was ready to submit to any reasonable terms. [*Tindal*, C. J.—The difficulty I have is, that the rule will afterwards burthen the other party with additional costs.] There is no reason to believe that cause will be shewn against the rule.

Under particular circumstances, the Court will dispense with the rule in this Court, requiring an application for judgment against the casual ejector to be made within the four first days of term.

TINDAL, C. J.—You may take a rule to shew cause.

Rule nisi granted.

(a) 1 Bing. N. C. 161.

Lawr. H. 17. L. S. Q. B. 99.

Ex parte COGG.

GODSON moved for the discharge of the defendant out of custody, as regarded a suit in this Court. He had been arrested on a ca. sa. at the suit of a plaintiff in the Exchequer, but that writ had been set aside on the ground of irregularity. The defendant was now in custody on a detainer lodged against him in a suit in this Court.

If, after an irregular arrest, to the illegality of which the sheriff is no party, and which is afterwards set aside, the defendant is innocently detained by a person in another suit, the Court will not discharge him as to the detainer.

TINDAL, C. J.—The case of *Barratt v. Price (a)* is, I think, an answer to your application.

(a) Ante, Vol. 1, p. 725.

1838.

Ex parte
Cogg.

BOSANQUET, J.—If the sheriff is not a party to the illegal arrest, I think the subsequent detainer can be justified.

TINDAL, C. J.—If the defendant is detained innocently by another person, after the first arrest, the defendant is not entitled to his discharge. I think that is the distinction which is to be drawn.

Rule refused.

WEEKES v. PALL.

The fact of a plaintiff not proceeding promptly in a cause, is no answer to a rule for examining a material witness on interrogatories, who is going abroad.

J. BAYLEY shewed cause against a rule obtained by *R. V. Lee* for examining, on interrogatories, a witness, whose evidence was sworn to be material and necessary for the plaintiff in the action, and who was on the point of sailing for the island of Ceylon. There was no objection to the application, provided the Court should think the plaintiff was in time. The action had been commenced in April, 1836, and the defendant had pleaded in the following May, but no steps in the cause were afterwards taken until the 1st of November, 1837, when notice was given that the plaintiff intended to proceed after the end of that month. He did not go on, however, until the present month of January. It was submitted, that in order to entitle the plaintiff to have a rule of this description absolute, he should have proceeded promptly.

TINDAL, C. J.—I think the objection is not sufficient to call upon the Court to discharge this rule.

Rule absolute.

1838.

Ex parte WARE, Gent., One, &c.

TULLY moved for a rule, directing the Master of this Court to add the name of *Ware*, to the name of the applicant, (an attorney), on the roll.

When an attorney changes his name, the Court will not grant a rule for altering his name on the roll, by adding his new name to that which is already engrossed on it.

TINDAL, C. J.—He may take out his certificate with his new name, if he pleases.

Tully urged that the amendment had already been ordered to be made in the other Courts. The applicant was admitted in 1824, but had only recently taken the name of *Ware*, in addition to that which he previously bore.

TINDAL, C. J.—Why are we to have his name altered? it may be a mode of acquiring a new name.

Tully.—The applicant swears he has already acquired it by a regular license.

TINDAL, C. J.—He will not get into any difficulty by the application being refused. It is a mere matter of fancy.

BOSANQUET, J.—He has not abandoned his own name, but has only added another to it.

Rule refused.

1838.


HILARY TERM, 1 VICTORIÆ.

IT IS ORDERED, that on and after the first day of next Easter Term, every rule for judgment as in case of a non-suit after a peremptory undertaking and default, shall be absolute in the first instance.

IT IS FURTHER ORDERED, that from and after the last day of this present Hilary Term, it shall not be necessary to file warrants of attorney to prosecute and defend previous to or at the time of signing interlocutory or final judgment, or at any stage of a cause.

IT IS ALSO FURTHER ORDERED, that from and after the last day of this Term, all judgments may be signed on the morning after the day on which the time for pleading has expired.

IT IS ALSO FURTHER ORDERED, that on and after the first day of next Easter Term, every motion for judgment against the casual ejector in ejectment in London and Middlesex, may be made on any day during the Term.

N. C. TINDAL.

J. A. PARK.

J. B. BOSANQUET.

QUEEN'S BENCH PRACTICE COURT.

Easter Term,

IN THE FIRST YEAR OF THE REIGN OF VICTORIA.

HILARY TERM, 1 VICTORIÆ, 1838.

WHEREAS by the practice of this Court in all actions of ejectment, it is necessary that the plea and consent rule should be filed at the chambers of one of the Judges of the same Court.

1838.

IT IS HEREBY ORDERED, that from and after the last day of this present Term the said practice be discontinued, and in all such actions, the plea with the consent rule annexed thereto, be delivered in like manner as pleas in other actions, the defendant's appearance being first entered with the proper officer as heretofore.

(Signed) DENMAN.
J. LITTLEDALE.
J. PATTESON.
J. WILLIAMS.
J. T. COLERIDGE.

ESDAILE and Others *v.* DAVIS.

CROWDER shewed cause against a rule nisi obtained by *Heaton* for discharging the defendant out of custody, on the ground of a defect in the testatum ca. sa., on which him to object that there was no indorsement on the writ of his residence, pursuant to H. T. 2 & 3 Geo. 4, K. B., on the first day of H. T. 1838, although he swears that he was not aware of the defect until a short time before the application, as he was bound to be aware of the defect as soon as he was aware of the proceeding in which the defect arose.

Where a defendant was taken in execution on a test. ca. sa. in July, 1833, it is too late for

Quære, whether the above indorsement is for the benefit of the sheriff, or of the defendant also?

The omission of an original ca. sa. is no objection to a test. ca. sa., which has been issued without the former writ, although issued after an application is made to set aside the test. ca. sa.

1838.

ESDAILE
v.
DAVIS.

the defendant had been taken in execution. The defect alleged was, that no statement of the defendant's residence had been indorsed on the writ. The defendant was arrested in the month of July, 1833, and the rule nisi was obtained in the present term. The application was, therefore, too late. The objection was founded on an alleged irregularity, and therefore the defendant ought to have come promptly to the Court. But the description of the defendant to be indorsed on the process was a mere matter of direction to the sheriff, and for his benefit only. The case of *Clarke v. Palmer* (a), appeared an authority to that effect. In *Kenrick v. Nanney* (b), the Court held that the sheriff is not bound to execute bailable process on which the place of abode and addition of the defendant are not indorsed, although, at the time of receiving the process, he made no objection to the want of indorsement. The defendant, therefore, had no right to avail himself of this objection. Another objection was, that no original writ of ca. sa. had been sued out to warrant the issue of the testatum ca. sa. This objection was perfectly untenable, because an original writ of ca. sa. might be issued at any time after the testatum ca. sa. had been executed. The case of *Davidson v. Dunne* (c), was a direct authority to that effect. The Court there said, "After the testatum has issued, the original ca. sa. is a mere formal process giving no information to the parties." The case of *Constable v. Fothergill* (d), decided that after the lapse of two terms *the Court will not discharge a defendant out of custody* on the ground that his addition and place of abode are not indorsed upon the writ of ca. sa. Here, however, several years had elapsed since the defendant was taken in execution on the writ of ca. sa. The application, therefore, was unquestionably too late.

(a) 9 B. & C. 153.

(b) Ante, Vol. 1, p. 58.

(c) Ante, Vol. 4, p. 119.

(d) Ante, Vol. 2, p. 591.

Heaton, in support of the rule, contended that the original ca. sa. not having been issued in the present case until after the rule had been obtained on the part of the defendant, it was clearly too late to support the testatum ca. sa.

1838.
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 v.
 DAVIS.

PATTESON, J.—I think the case of *Davidson v. Dunne*, is decisive against that objection.

Heaton then produced an affidavit, in which it was sworn that the defendant was unaware of the defect until a very short time previous to the application. The defendant, therefore, could not be considered as guilty of laches in not taking advantage of the objection, since a man could not waive an objection of which he was unaware. Then, with respect to the right of the defendant to take advantage of it: in the case of *Constable v. Fothergill*, the case last cited on the other side, Mr. Justice Patteson said, “I do not adopt the argument that the rule was made for the benefit of the sheriff.” He then cited *Rice v. Huxley* (a), in which it was held, that if the place of residence of the defendant is not inserted in the writ of capias, it may be set aside at the instance of the defendant, though his residence is stated in the copy of the writ; and *Rolfe v. Swain* (b), which was a case where the defendant was described in the capias as a clerk in the army pay office, at Somerset House, the Court held the description insufficient, and set aside the writ.

Cur. adv. vult.

PATTESON, J.—This was a motion to discharge the defendant out of custody, on the ground that the writ of testatum ca. sa., on which he was taken in execution, was not indorsed with his residence. The question was, whe-

(a) Ante, Vol. 2, p. 231.

(b) Ante, Vol. 5, p. 106.

1838.

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v.
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ther the rule of court as to the indorsement of the defendant's residence was made for the benefit of the sheriff only, or whether the defendant is at liberty to set aside the writ on account of an omission in that respect. Several cases were cited, in which it was intimated that the indorsement was for the benefit of the sheriff only. I do not wish to express any opinion on that point, but it strikes me that all the arguments adduced from the Uniformity of Process Act are not very applicable, on account of the distinction which exists between mesne and final process. In the species of process provided by that act, it is required that the indorsement should be made, in order to enable the defendant to see that he is the person intended. But in the instance of a *ca. sa.* it is quite different, because there, the proceedings have been going on a long time, and therefore he cannot have any doubt that he is the person intended. I only say this, lest it might be thought that I acceded to the arguments drawn from the Uniformity of Process Act. But that point is not necessary for me to determine, as I am of opinion that the application is too late. The rule was obtained in Hilary Term, and I will assume that it was obtained on the first day, and he has remained in prison ever since the 1st July, 1833. The rule is, that a party shall not be permitted to take advantage of an irregularity, and this is merely an irregularity, after so long a lapse of time. There are cases, where it is laid down, that a man cannot waive an irregularity if he do not know of it. But the rule is, that when he does know of it, he must apply promptly. What is meant by the rule, that he is bound to come promptly, is, that he is bound to come promptly after he knows of the proceeding in which the supposed irregularity exists, and not after he knows of the irregularity itself. A man is bound to know of every proceeding taken against him, and if there be any error in it he ought to ascertain that error; he cannot be heard to say that he did not know of it. In one case, a

judgment was signed against a man, and it was said that he was not bound to come to the Court until he knew of the judgment, but that does not mean that he was not bound to know of every irregularity in the judgment itself. That appears to me to be the explanation of several dicta in different cases, where it seems, from the facts, that it was supposed a man was not aware of the proceeding, and consequently not aware of the defect, and thus was not bound to come to the Court until he was aware of it. But a man is aware of a ca. sa. being sued out against him, and he is therefore bound to be aware of any defects existing in the process. I think, under these circumstances, this rule should be discharged, and with costs, because it was moved with costs. I shall not decide the other point, as to whether the direction be for the benefit of the sheriff or not.

1838.
—
ESDAILE
v.
DAVIS.

Rule discharged with costs.



DOR *d.* SIMPSON *v.* ROE.

GUNNING moved, on behalf of the defendant, for a rule to shew cause why the declaration in this case should not be set aside, on the ground that there was no attorney's name in it.

It is no objection to a declaration in ejectment, that no attorney's name has been introduced into it.

PATTESON, J.—If the tenant has appeared, the objection is cured. If he has not appeared, he cannot be admitted to take the objection. The rule now sought to be obtained cannot therefore be granted.

Rule refused.

1833.

If the attorney of the party who has subpoenaed a witness gives him leave to be absent until a particular time, and in the interim, the cause is called on in the absence of the witness, the latter is not liable to an attachment for a contempt.

FARRAH v. KEAT.

CHANDLESS shewed cause against a rule nisi, obtained by *Dowling* for an attachment against a person named Farr, for an alleged contempt committed by him in not attending at the assizes at Hertford, pursuant to his subpoena. In answer to the rule, an affidavit was sworn by Farr, in which he stated, that he had attended the assize town, on the commission day, and seen the attorney for the plaintiff on whose behalf the subpoena had been served. The attorney then told Farr, that the cause would not come on before twelve o'clock on the following day, and therefore he need not be in Court until that time. In consequence of this suggestion, he had not come into Court until half-past eleven on the following day. He then ascertained that the cause had been called on at ten o'clock, and disposed of, before he came into Court. Under these circumstances *Chandless* submitted, that the application on the part of the plaintiff had been fully answered.

Dowling, in support of the rule, submitted that the witness was bound to attend the Court according to the exigency of the writ of subpoena, and not having done so, he was guilty of a contempt. He cited *Barrow v. Humphreys* (a), in which *Abbot*, C. J. observed, "adverting to the form of the subpoena, which commands the witness to be before the Court on a given day, it does seem to me at present, that if a party forbears to attend, in obedience to it at the assizes, he is in contempt."

COLERIDGE, J.—But here, the supposed contempt is explained. The act of the plaintiff's attorney, in giving him

(a) 3 B. & Ald. 598.

leave to be absent at the time at which it appears the cause came on, I think dispensed with the attendance of the witness, so as to prevent his non-attendance from being a contempt. The present rule must therefore be discharged, and with costs.

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Rule discharged, with costs.

CHRESEWRIGHT v. FRANKS.

GURNEY moved for leave to issue execution on a judgment obtained in the Mayor's Court of the city of London. The application was made under the 19 Geo. 3, c. 70, s. 4, on account of the defendant having removed himself and his goods out of the jurisdiction. A peculiarity existed in the present case, that the original judgment in the cause had been destroyed by the late fire in the Royal Exchange. It was consequently impossible, according to the usual practice, to remove the original judgment. The question therefore was, whether the execution could be issued on a verified copy of the judgment.

Where the original judgment in an inferior court has been destroyed by fire, the Court will allow execution to be issued under a verified copy of the judgment.

WILLIAMS, J.—I think, that under the peculiar circumstances, you may have your rule, and issue your execution on the verified copy of the judgment.

Rule granted.

DOE d. COX v. BROWN.

WIGHTMAN shewed cause against a rule nisi obtained by *W. H. Watson*, calling upon the lessor of the plaintiff to shew cause why, upon payment of all the principal monies due, and interest on the mortgage, and also

On an application under the 7 Geo. 2, c. 20, s. 1, the mortgagor sufficiently shews himself to have become the de-

fendant in the action of ejectment, by swearing "that he had entered the usual appearance," without proceeding to state that he had entered into the consent rule.

1838.

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BROWN.

costs to be ascertained by the Master, the same should not be taken to be in full satisfaction and discharge of the mortgage; and why the mortgagee should not reconvey the mortgaged premises, and deliver up all deeds, &c., relating to the title thereof to the mortgagor. This was an application under the 7 Geo. 2, c. 20, s. 1, by which it was provided, that "if the person having a right to redeem shall, at any time pending the action, pay to the mortgagee, or in case of his refusal, bring into Court, all the principal monies and interest due on the mortgage, and also costs to be ascertained and computed by the Court, or proper officer appointed for that purpose, the same shall be deemed and taken to be in full satisfaction and discharge of the mortgages; and the Court shall discharge the mortgagor of and from the same accordingly, and compel the mortgagee, by rule, to reconvey the mortgaged premises, and deliver up all deeds, &c., relating to the title thereof, to the mortgagor, or to such other person as he shall nominate or appoint." The words of the section were "pending the action;" and in *Doe d. Hurst v. Clifton* (a), it was held, that "a mortgagor, in order to entitle himself to the benefit, in a court of law, of statute 7 Geo. 2, c. 20, s. 1, must become a defendant in the action of ejectment; and where he is not such defendant, the Court will not interfere, either under the statute, or in the exercise of its general power over actions in the Court." The question then was, whether the mortgagor in the present case, had become defendant in the action. It was submitted that he had not. All that was sworn in the affidavit was, "that he had entered the usual appearance." This was not sufficient, because a party could not become defendant in an action of ejectment, without entering into the consent rule. Nothing appeared in the affidavit to shew, that he had entered into the consent rule. Not having entered

(a) 4 Ad. & El. 814.

into the consent rule, he was not a defendant, and therefore was not entitled to avail himself of this statute.

W. H. Watson, in support of the rule, contended, that enough was shewn on the face of this affidavit, to prove to the Court, that the mortgagor had become the defendant in the action. It was sworn "that he had entered the usual appearance," which must be taken to mean, that he had entered an appearance according to the practice of the Court, inclusive of entering into the consent rule.

1838.

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WILLIAMS, J.—(After consulting Master Bunce.) The Master tells me, that the two acts of entering into the consent rule, and entering the appearance, are almost contemporaneous acts. As it is not sworn that the mortgagor has not entered into the consent rule, I must presume the proper steps have been taken in order to render the mortgagor the defendant in the action, according to the regular practice of the Court. I think, therefore, the present rule ought to be made absolute.

Rule absolute.

HANDFORD v. HANDFORD.

ROSS shewed cause against a rule nisi obtained by *R. V. Richards*, either for setting aside the verdict found in favour of the plaintiff to the amount of 2*l.* 13*s.* and entering a nonsuit, or obtaining a new trial, or for an arrest of judgment. The cause was an issue tried before the Judge of the Palace Court. The first objection was, that the plaintiff, in taking issue on the first of the two pleas, had not added the *similiter* for the defendant.

It is no objection to a verdict that no *similiter* has been added, if there is an "&c." at the end of the replication.

It is a ground for arresting judgment on a verdict on a writ of trial, if that part of

the form given by the rules of H. T. 4 Will. 4, which gives jurisdiction to inferior courts to try issues from the superior ones, is omitted.

1838.
 ———
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 v.
 HANDFORD.

R. V. Richards admitted that he could not support that objection, as an “&c.” had been added to the replication (a).

Ross.—The second objection was, that the writ of trial omitted any reference to the amount of the debt to be recovered in the action, and consequently it did not appear that the Palace Court had jurisdiction to try the cause. In the form of the writ of trial given by the Pleading Rules, 4 Will. 4 (b), the words were after the statement of the joinder of issue, “and forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed 20*l.*, hereupon,” &c. In the present instance, the only words introduced into the writ of trial were “forasmuch, &c.,” without any reference to the sum sought to be recovered in the action. This, it was submitted, was an immaterial omission which the practice justified, and which it was now too late to make the subject of an objection. The third objection was, that there was a variance between the declaration and the evidence. The declaration was, for goods sold and delivered to the defendant. The proof was, that they were delivered to another person by the direction of the defendant. A delivery to a particular person, by the direction of another, was in point of law a delivery to that other. Had any point of this sort been taken at the trial, and attempted to be enforced, the Judge would, as a matter of course, have directed the record to be amended. No such objection however was enforced, but, on the contrary, it was waived. Under these circumstances, it was contended, that the present rule ought to be discharged.

(a) See *Swain and Others v. v. Finch*, id. 313.
Lewis, ante, Vol. 3, p. 700; *Siboni* (b) Ante, Vol. 2, p. 329.
v. Kirkman, ante, p. 98; and *Brook*

R. V. Richards, in support of the rule, cited, as to the last point, the case of *Ramsden v. Ambrose* (a), the marginal note of which was, "where husband and wife live separate, cannot declare for her board as for meat and drink for him found and provided." With respect to the second point, in consequence of the omission which was the subject of objection in the writ of trial, the form given by the rule of Court sufficiently shewed that the plaintiff was irregular in his proceedings. By the omission in question, it appeared that the proceedings before the Palace Court were perfectly unauthorized. Without the provisions of the 3 & 4 Will. 4, c. 42, the inferior court referred to had no jurisdiction to try this issue; unless, therefore, it appeared by the proceedings that they took place under the authority of the statute, they were entirely *coram non judice*.

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COLERIDGE, J.—Upon the first point, I should certainly not have disturbed the verdict. As to the last, it is enough to say, without entering into the cases, that a delivery to one by the direction of another, is the same as a delivery to the latter. Now, with regard to the second point. The power to issue the writ of trial is a limited authority, and the rule of Court has directed by its form, that reference should be made to the authority which gives jurisdiction to the inferior court. It is not, therefore, like the ordinary case of a venire at the end of an ordinary record, where omissions are frequent; for here, the whole of that which gives jurisdiction to the Court has been omitted. It is sworn, that this is the form adopted by attorneys in practice. But I am informed by the officer of the Court that such is not the practice, for that there is an additional amount of folios altered on taxation for the substance of the writ as given in the form. If such a

(a) 1 Str. 127.

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practice has ever prevailed amongst any persons, the sooner it is abolished the better. I think the rule ought to be absolute for arresting the judgment on this point.

Rule absolute accordingly.

WHITE v. CAMERON.

It is not a sufficient compliance with 1 Reg. Gen. H. T. 2 Will. 4, s. 72, that an attorney should be named by the plaintiff, and adopted by the defendant in custody on mesne process, when executing a warrant of attorney.

THEOBALD shewed cause against a rule nisi obtained by *Price* for discharging the defendant out of custody, on the ground of a noncompliance with 1 Reg. Gen. H. T. 2 Will. 4, s. 72 (a), by which it was ordered that "no warrant of attorney to confess judgment, or cognovit actionem, given by any person in custody of the sheriff or other officer upon mesne process, shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending at his request to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be the attorney for the defendant, and state that he subscribes as such attorney." It appeared by the affidavits in the present case, that the defendant had been arrested on mesne process, and while in custody had proposed to give a warrant of attorney. The plaintiff, who was present, named a particular attorney to act on behalf of the defendant, and the latter accordingly adopted him. This, it was submitted, was a sufficient compliance with the rule of Court. The object of the rule was, that a defendant in custody should have the assistance of a legal adviser; no matter whence the attorney came, or who happened to mention

(a) Ante, Vol. 1, p. 192.

him, provided the defendant treated him as his attorney. The mere circumstance of his name being mentioned by the plaintiff could not prevent the defendant from obtaining all the protection which the rule of Court intended to bestow.

Price supported the rule, and was stopped by the Court.

WILLIAMS, J.—The case of *Fisher v. Nicholas* (a) is exactly in point. There, it was held that it must expressly appear that the attorney, who attended on behalf of the defendant, did so at his request, and was named by him, otherwise the Court will set it aside. In the case of *Walker v. Gardner* (b), Mr. Justice Taunton referred with approbation, to what was observed by Lord Kenyon, in the case of *Hutson v. Hutson* (c). His Lordship's remark was, "there is great weight in the observation made by counsel in support of the rule, that the defendant, under pressure of an arrest, ought to be considered incapable of waiving the benefit of this rule, and that, at all events, and in all cases, he should be protected by the advice of an attorney expressly attending for him." These cases shew, that the mere nomination by the plaintiff, and the adoption by the defendant is not a substantial compliance with the rule. Under these circumstances, I think that the present rule ought to be made absolute, with costs.

Rule absolute, with costs.

(a) *Ante*, Vol 2, p. 251.

(b) 4 B. & Ad. 371.

(c) 7 T. R. 7.

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HANDFORD
v.
HANDFORD.

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(a) Ante, Vol. 1, p. 192.

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Rule absolute, with costs.

(a) Ante, Vol. 2, p. 251.

(b) 4 B. & Ad. 371.

(c) 7 T. R. 7.

1838.

In order to sign judgment on an old warrant of attorney, it is sufficient in support of an application on the 10th of May, to produce a letter from the defendant, dated the 27th of April, at Nice.

GRANTLEY v. SUMMERS.

V. WILLIAMS applied, on the 10th of May, to enter up judgment on an old warrant of attorney. The mode in which it was shewn that the defendant was still alive, was by a letter dated the 27th of April, from Nice, in Italy.

WILLIAMS, J.—I think that is sufficient.

Rule granted.

DOE d. BERGER v. DOCKER.

The 14 Geo. 2, c. 17, as to judgment in case of a nonsuit, applies to actions of ejectment, as well as to other actions.

HALCOMB shewed cause against a rule for judgment, as in case of a nonsuit. It was an action of ejectment, and although he had examined the authorities, he had not been able to discover any case in which it had been held, that the 14 Geo. 2, c. 17, which entitled defendants to obtain, in certain cases, judgment as in case of a nonsuit, applied to actions of ejectment. All the cases in which he had found discussions, with respect to such a judgment, were of personal and not mixed actions. It was a matter of doubt, therefore, whether the defendant was entitled to obtain his rule in the present case.

COLERIDGE, J.—The words of the act of Parliament are, “where any issue is or shall be joined, in any action or suit at law, in any of his Majesty’s Courts of Record at Westminster.” The action in ejectment is an action at law, and it appears that issue was joined in it in the present case. I think, therefore, that it is within the statute. The practice has always certainly been to treat actions of ejectment as within the statute.

The rule was afterwards discharged on a peremptory undertaking.

1838.

DOE *d.* FRODSHAM *v.* ROE.

RYLAND moved for judgment against the casual ejector. There was some difficulty with respect to the day on which the service took place. The service had been effected on the daughter of the tenant in possession, and an acknowledgment had afterwards been received, that the declaration had come into the hands of the tenant on the 16th of April. The question was, whether this service was in sufficient time. By 11 Geo. 4 & 1 Will. 4, c. 70, s. 6, Easter Term was made to commence on the 15th of April, and it was further provided, by that section, "that if the whole or any number of the days intervening between the Thursday before, and the Wednesday next after Easter day shall fall within Easter Term, there shall be no sittings in banc on any such intervening days, but the term shall in such case be prolonged and continued for such number of days of business as shall be equal to the number of the intervening days before mentioned, exclusive of Easter day, and the commencement of the ensuing Trinity Term shall in such case be postponed, and its continuance prolonged for an equal number of days of business." Then, by 1 Will. 4, c. 3, s. 3, it was enacted, "that in case any of the days between the Thursday before and the Wednesday next after Easter, shall fall within Easter Term, then such days shall be deemed and taken to be a part of such term, although there shall be no sittings in banc on any of such intervening days." Then, by Reg. Gen. Easter Term, 2 Will. 4 (a), it was ordered, "that the days between the Thursday next before, and the Wednesday next after Easter day, shall not be reckoned or included in any rules, or notices, or other proceedings, except notices of trial and notices of inquiry,

Service in ejectment on any of the days intervening between the Thursday next before, and the Wednesday next after Easter day, when they fall within Easter Term, is insufficient.

(a) Ante, Vol. 1, p. 423.

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in any of the courts of law at Westminster." From the construction to be put upon that rule, connected with the two acts of Parliament, it was submitted, that the service in the present case was sufficient.

COLERIDGE, J.—I am of opinion that there has been no sufficient service in this case. The rule of court does not affect a proceeding in ejectment. The 1 Will. 4, c. 3, s. 3, renders the day in question a part of Easter Term, and as the practice of the Court renders it necessary, that the declaration should be served previous to the commencement of the term, this cannot be considered as an adequate service.

Rule refused.

ARGENT v. REYNOLDS.

If the service of a writ of summons is irregular, a rule to set aside both service and copy of the writ does not require too much.

PEACOCK shewed cause against a rule nisi obtained by *Perry*, for setting aside the service of a writ of summons, and the copy thereof, on the ground of irregularity. The alleged irregularity was, that the defendant was described as of Ongar, in Essex, and he was served with the process in the city of London. *Peacock* admitted that the service was irregular, but he submitted that the rule asked for too much, as it sought to set aside the copy of the writ, whereas only the service was irregular. He cited *Huggett v. Parkin* (a), the marginal note of which was, "if a party incurs the expense of resisting a rule to quash a writ for irregularity, and it turns out that the irregularity is not in the writ, but only in the service, the Court will discharge the rule with costs. On the authority of this case, it was submitted that the present rule having asked for too much, ought to be discharged in a similar manner.

(a) 1 Bing. 65.

Perry, in support of the rule, distinguished the present case from the one cited, because there, the writ remained good, although the copy might be bad ; but here, if the service were set aside, the copy was a mere nullity. It could not therefore be said, that too much was asked, when that which was alleged to be the excess, was only the result of succeeding on the first part of the rule.

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Cur. adv. vult.

WILLIAMS, J.—I took time to consider the objection which was raised in this case to the form of the rule, as it was said that too much was asked. It was contended, that as there was nothing wrong in the copy of the writ, but merely in the service, the application should have been confined to the latter. The case of *Huggett v. Parkin* was relied on, and there are other cases to the same effect. But there, the objection was, that the writ was right, and only the service was wrong. But in the present case, there is nothing at all right, for if the service is set aside, the copy falls with it. That was only the mode in which the service was effected. The rule being to set aside both service and copy does not, in my opinion, ask too much. The present rule must therefore be made absolute.

Rule absolute.

MAGGS v. YORSTON.

CHANNELL shewed cause against a rule obtained by *Busby*, for setting aside a judgment signed pursuant to an award. The cause had been referred by a Judge's order, the important passages of which were, "that the costs of the said cause, and of the reference and award

Where an order of reference directs "that the party in whose favour the award shall be made, shall be at liberty to sign final judgment for the

amount which shall be payable thereunder, and tax his costs, and issue execution thereon for such amount, together with such costs so to be taxed," and the award is in favour of the defendant, the latter may sign judgment for his costs.

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shall abide the event of the said award;" it then proceeded in a subsequent part, "that the party in whose favour such award shall be made, shall be at liberty to sign final judgment for the amount which shall be payable thereunder, and tax his costs, and issue execution thereon for such amount, together with such costs so to be taxed as aforesaid, any time after the expiration of six weeks from the date of such award." The arbitrator to whom the cause was referred, decided in favour of the defendant, and the latter signed judgment for his costs. It was submitted, that the defendant was perfectly regular in taking this course. The clear intention of the parties was by the order of reference, that the remedy should be mutual. If the arbitrator's award should be in favour of the plaintiff, then he would be entitled to sign his judgment for the sum awarded in his favour, as well as his costs. If, on the other hand, the award should be in favour of the defendant, the latter should be entitled to sign judgment for his costs.

Busby, in support of the rule, submitted that the terms of the reference did not authorize the defendant to sign judgment for his costs, in case of the award being in his favour. By the terms of the order, the power to sign judgment for costs was confined to the party in whose favour some "amount" should be "payable." The award rendered no amount payable, and therefore the defendant could have no right to sign judgment for his costs.

WILLIAMS, J.—I have no difficulty in saying, that there is here an imperfect expression of what was the clear understanding of the parties. It was evidently meant that there should be mutual and equal remedies in the event of a decision in favour of either. Strictly speaking, the defendant cannot be said to be a person who has anything to receive, or to whom anything is payable; for

fugit non petit. The award, however, was in his favour; and in order to make his success even with that of the plaintiff, there should be the same means in his power of procuring his costs under the award, which has been made in his favour. Here, there is a provision, that the person in whose favour the award is made shall be at liberty to sign judgment. The remedy therefore is common to both. The defendant has succeeded as much as the plaintiff would have succeeded, if the award had been in favour of the latter. I should leave this an imperfect instrument, if I did not hold that the defendant was right in signing this judgment, as it was certainly the intention of the parties that he should have power to do so, if the award should be in his favour. The present rule must therefore be discharged.

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MAGGS
v.
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Rule discharged.

JONES v. POWELL.

E. V. WILLIAMS shewed cause against a rule nisi obtained by *R. V. Richards*, for setting aside an award on various grounds. He cited *Aitcheson v. Cargey* (a), *Manser v. Heaver* (b), *Biddell v. Dowse* (c), *Lawrence v. Hodgson* (d), *Evans v. Thomson* (e), *Greig v. Talbot* (f), *Boodle v. Davies* (g).

R. V. Richards supported the rule, and referred to *Watson on Awards* (h).

Cur. adv. vult.

Where several causes are referred, and "the costs of the several actions, and of all matters and things relating thereto, shall abide the event of the award;" and the arbitrator directs the costs of each action to be paid to the successful party

in each suit, the award is good, although the same party has not succeeded in all the actions.

After an award has been made, it is too late for the unsuccessful party to object that certain infants have been parties to the submission, and that certain other interested persons have not been parties to it.

(a) 2 Bing. 199.

(b) 3 B. & Ad. 295.

(c) 6 B. & C. 255; 9 D. & R. 404; 10 Moore, 272; 3 Bing. 20.

(d) 1 Y. & Jer. 16.

(e) 5 East, 189; 1 Smith, 380.

(f) 2 B. & C. 179; 3 D. & R. 446.

(g) 3 Ad. & El. 200; 4 N. & M. 788.

(h) Page 125, ed. 2.

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COLERIDGE, J.—This was a rule for setting aside an award which was argued before me last term, upon several grounds. Of these the first is, that the award as to the costs is not made in pursuance of the submission. By the submission it appears, that an action of replevin and two actions of ejectment were referred, together with the subject-matters thereof; and it was also agreed “that the costs of the said several actions, and of all matters and things relating thereto, should abide the event of the award, and be borne and paid by the parties at such time and in such manner as the same shall be thereby ordered to be paid, and that the costs and charges of the submission, reference, and award, shall be in the discretion of the arbitrators.” The award as to the replevin finds that the plaintiff had no cause of action, and that he owed 15*l.* for rent to two of these defendants, who were the avowants in their own right in the action, which sum, together with the costs, the award orders to be paid to the defendants on a day named. In the first ejectment, the award finds for the lessors of the plaintiff, and in the other for the defendant, and as to the costs in them respectively, directs them to be paid in a similar manner to the victorious parties in each. It was objected that these three directions as to the costs are wrong, because the costs generally were to abide the event of the award, and the award has no event, where it is made partly in favour of the one side, and partly in that of the other. I think, however, that the arbitrators have taken the right and only reasonable view of this submission; whereas, here, in substance, several actions are referred and no more, and the costs are to abide the event—that must mean the event of the award as to each action distributively. The primary object of such a clause is not merely to take the discretion from the arbitrator, but also to make the costs follow in the course of law, whatever the arbitrator may think of the equitable merits; but that object would be often frustrated in a great

measure, if the consequence of a partial finding should be that no costs were to be paid at all. In coming to this decision, I do not intend to impeach any cases, of which some are reported, and many have been decided, where an action and all matters in difference having been referred, all costs are to abide the event of the award, as well of the action as of the other matters, reference, &c., in which, the Courts, bound by the words of the submission, have held that no costs are payable, unless every thing be decided one way. This case seems to me to stand on its own grounds. I interpret the submission to mean, that, as to the actions, the law shall take its course in regard to costs; as to the award and reference, the arbitrators are to have a discretion. They have done, therefore, nothing more as to the former than they were authorized to do; that is, to follow the law, and regulate the time of payment. This objection, therefore, cannot prevail.

The second and fourth objections may be taken together; they are, that some of the parties whose interests were refused are not of full age; and that two persons, one of them a defendant in the replevin suit, the other a lessor of the plaintiff in one of the ejectments, are not parties to the submission. I am very clearly of opinion that I ought not to set aside the award on either of these grounds; whatever might be the weight of these objections under some circumstances, or whatever inconveniences they may occasion hereafter, the party entering into the reference cannot entitle himself to this relief upon these grounds; he must be taken to have known who were the parties to the actions to which he himself is a party, and to the submission which he enters into; and it would be most unjust to allow him to take the chance of an award in his favour, and, that failing, to claim to set aside the whole proceedings for a defect in the submission, of which, he had full cognizance when he entered into it.

The third, as to the enlargement, was abandoned on the argument.

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The fifth is, that the arbitrators had ordered judgment to be entered up, which they had no authority to do. The submission authorizes them in terms "to discontinue or order the determination of the actions, and to make or give any orders or regulations or directions which they shall think proper as to the time and terms of such discontinuance, or of any other matter or thing in anywise relating to the said several actions." These are very large powers; and the award simply orders, "that the said actions shall cease and determine, and be no further prosecuted." In this, I can see no excess of authority; indeed, if there had been, the excess, being severable from the main provisions of the award, might be void without affecting the remainder.

The sixth objection is, that the award directs proceedings in the actions to cease, and nevertheless directs judgment to be entered up in one of such actions. If by this it is intended to point out an inconsistency, the answer is, that the two parts are to be read together, and then it will stand thus:—the action in ejectment is to cease, unless you, the defendant, fail in giving up the premises by a certain day, in which event the lessors may enter up judgment, and take out their execution. So read, there is nothing inconsistent; and if it be objected, that the latter part of the direction exceeds the authority of the arbitrators, I think it may be answered as the previous objection has been.

The last objection is, that the award is not certain or final; in *what respect* was not pointed out in the rule. The defendant, therefore, might have been precluded by the rule of Court, as construed by this Court in *Boodle v. Davies*, from going into it. The only ground, however, urged, was the same relied on and disposed of under the fourth head.

The rule therefore must be discharged.

Rule discharged.

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EDWARDS v. PRICE, and Others.

SIR WILLIAM FOLLETT and *Halcomb* shewed cause why judgment should not be entered for the plaintiff, notwithstanding the verdict found for the defendant. The declaration was in trespass, for breaking and entering a house, and taking goods under colour of a distress for certain pretended arrears of rent. Damages 200*l*. The pleas were, first, except as to certain trespasses enumerated, and taking goods to the value of 20*l*., not guilty; secondly, as to so much of the trespasses enumerated in the first plea, the defendants say, that the plaintiff ought not further to maintain his action, because they say that, after the commencement of this suit, and before the plaintiff declared therein as aforesaid, they, the said defendants, by leave of Mr. Justice *Patteson*, one of the judges of this Court, for that purpose, first had and obtained according to the form of the statute in such case made and provided, brought into Court here the sum of 20*l*., ready to be paid to the plaintiff by way of compensation or amends for the said several trespasses in the introductory part of the said first plea mentioned. The said sum of 20*l*. so brought into Court by the said defendants, as aforesaid to wit, on the day and year last aforesaid, they, the said defendants, from thence hitherto continually have had, and now have in Court here ready to be paid to the plaintiff, and the defendants further say, that the plaintiff has not sustained damages to a greater amount than the said sum of 20*l*., &c. Replication, that the plaintiff has sustained damages to a greater amount, on which issue was joined. The order of Mr. Justice *Patteson* was in these words:—"Upon hearing the attorneys or agents on both sides, I do order that upon all the defendants entering an appearance they be at liberty to pay into Court the sum of 20*l*., by way of compensation or amends to the plaintiff, and that they be

It is not a ground for arresting a judgment non obstante veredicto, that a plea, on which a verdict has been found in favour of the defendant, alleges money to have been paid into Court pursuant to 3 & 4 Will. 4, c. 42, s. 21, before declaration.

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at liberty to plead the same." The 20*l.* was paid into Court the same day. On the trial, the jury found that the plaintiff had not sustained greater damage than to the amount of 20*l.* It was contended in support of the rule, that the second plea was bad, because it unnecessarily stated that the money was paid in before declaration. That, however, would not render the plea bad. The statute 3 & 4. Will. 4, c. 42, s. 21, under which the plea was pleaded, only required that there should be the order of a judge, and said nothing about the money being paid into Court on or after declaration. The rules of H. T. 4 Will. 4 (a), did not declare that the money might not be paid in before declaration, but as they gave the form of pleading it, of course the inference was that it must be after declaration. Still, however, that would not prevent it being paid in before, and, at the utmost, this plea would only be held bad on special demurrer. But a stronger ground for opposing this rule is, that it seeks to have judgment entered for the plaintiff, non obstante veredicto. That is a rule only granted where an immaterial issue has been tried; and it is apparent to the Court, on the defendant's own shewing, that in any way of putting it he can have no merits. It is a judgment always upon the merits, and never granted but in a very clear case, as is distinctly laid down by Mr. Tidd (b). *Finlayson v. M'Kensie* (c), was also an authority on this point against the rule.

Kelly in support of the rule, contended that at common law this would be no plea, and it is therefore only under the statute 3 & 4 Will. 4, c. 42, s. 21, and the rules made in consequence thereof, that it can be pleaded. The statute gives power to plead this plea in such manner, and under such regulations as to the form of pleading, as the judges shall direct. The judges have accordingly directed a form of

(a) Ante, Vol. 2, p. 320.

(b) Prac. p. 963, 9th ed.

(c) Ante, Vol. 5, p. 71.

plea, and have by their rules clearly shewn their intention to be that the payment into Court should not be until after declaration. The order for this payment into Court is in consequence invalid, from having been made before declaration, and the plea is pleaded without authority. If then, independently of the statute, this plea would be no defence, and if in pleading it, the statute has not been pursued, then is this plea as pleaded no defence, and the defendant having thereby confessed the cause of action, and an immaterial issue having been tried, the plaintiff is entitled to judgment, non obstante veredicto.

Cur. adv. vult.

PATTESON, J.—I have examined the plea in this case, and think that on demurrer it would be held a good plea; but I have no doubt that the rule for judgment, non obstante veredicto, cannot be granted, looking at the plea as pleaded under the order of a judge made before declaration. Now, I have no doubt, on referring to the statute, that a judge has power to make the order *at any time*, and that it may be made immediately after the writ has issued, but then it must be done so that the plaintiff is not prejudiced, and so as not to deprive him of any costs which he would otherwise be entitled to. Now, in this case, if it had been attempted to stop the cause before declaration, by means of this order, it would have been wrong to do so; but here the money was paid into Court, and though the order does not say that the defendant may *now* pay into court, yet here, the money was immediately paid in, and in substance it was the same as if the money had been paid into court after declaration. The plaintiff might have replied, accepting the amount so paid in. He did not, however, do so, but chose, instead, to join issue on the question, whether he had sustained greater damages, and to go down to trial, and then, after

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a verdict against him, he seeks for judgment, non obstante veredicto, on the ground that the plea is altogether good for nothing. At most, it is only an irregularity, and in my opinion the plea would be good on demurrer. However, at all events, a rule for judgment, non obstante veredicto, cannot be granted, as that is only granted in a very clear case and on the merits. This rule must therefore be discharged.

Rule discharged.

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It is no ground for treating a rule nisi for a new trial as a nullity, that it has been obtained by a different attorney from the one on the record, without an order to change the attorney.

HUMFREY shewed cause against a rule obtained by *Whitehurst*, for setting aside the judgment signed in this case and all subsequent proceedings, for reviving the rule for a new trial, and for rendering good the service of a rule for a new trial by the defendant's present attorney. This cause was tried at the Summer Assizes, 1837, and a verdict found in favour of the plaintiff. The name of the attorney on the record was Raynes. In the subsequent Michaelmas Term, no order for the change of attorney having been obtained, a rule for a new trial was granted by the Court, on the application of an attorney named Nichols. The rule was afterwards served on the attorney for the lessors of the plaintiff in the name of the new attorney. This was treated as a nullity, and judgment was accordingly signed. It was to set aside this judgment that the present rule was obtained. *Humfrey* submitted that the judgment was perfectly regular. The lessors of the plaintiff had a right to treat the rule for a new trial as a nullity, there having been no order for the change of attorney. He cited *Ginders v. Moore* (a); that was a very strong case, as it affected the liberty of the subject. It was an application to discharge the defendant out of custody, on

(a) 1 B. & C. 654.

the ground that the debt in respect of which he was detained was proveable under a commission of bankruptcy, under which, he had obtained his certificate. The application being made by a different attorney from the one in whose name he had appeared and pleaded, the Court refused to discharge him. In *Lovegrove v. Dymond* (a), the reason why the objection did not prevail was, because the plaintiff was required to shew cause, and he did so in person. The rule, therefore, did not apply in that case, as it constituted an exception. But the Court there remarked, that the reason of the general rule was, that there should be some one person to whom the adverse party might look. The principle therefore was recognized in that case. Again, in *Rex v. The Sheriff of Middlesex* (b), the Court set aside an attachment against the sheriff for not bringing in the body, on the ground that the body rule had been obtained by a different attorney from the one whose name appeared in the previous proceedings, without an order for changing the attorney. In *Phillips v. Berkeley* (c), it was held to be a good objection to a rule requiring a bishop to make his return to a *levari facias*, obtained by an attorney not employed in the cause originally, that the order for changing the attorney had not been served upon the bishop. On these authorities it was contended that the judgment was regular, and therefore that the present rule ought to be discharged.

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Whitehurst, in support of the rule, contended that it was immaterial what attorney instructed the counsel who moved for a new trial. There was consequently nothing improper in the course which the defendant had pursued. If the fullest effect were given to the objection on the part of the plaintiff, it could only operate to render the de-

(a) 4 Taunt. 669.

(b) Ante, Vol. 2, p. 147.

(c) Ante, Vol. 5, p. 279.

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defendant's proceedings irregular, and could not render them a nullity. The plaintiff might have applied to set aside the rule or its service, but he was clearly not entitled to treat it as a nullity and sign judgment. The cases on the other side only shewed, that the proceeding might be considered as irregular, but not as a nullity. In *Margerem v. Makilwaine* (a), a clear authority was found to shew that the rule under such circumstances could not be treated as a nullity. There, it was held, that if the plaintiff takes a plea out of the office and keeps it, he waives any objection to the plea, on the ground of its having been pleaded by a new attorney, without any order to change the attorney. If the plea under such circumstances had been a nullity, the plaintiff could not have waived it, as a party cannot waive a nullity (b). Under these circumstances, it was submitted, that the present rule ought to be made absolute.

Cur. adv. vult.

WILLIAMS, J.—This was a rule calling on the lessors of the plaintiff to show cause why the judgment signed in this cause, and the subsequent proceedings, should not be set aside, and why the rule obtained on the 6th of Nov. last, for the lessor of the plaintiff to shew cause why the verdict should not be set aside and a new trial had, should not be revived; and why the service of the last mentioned rule by the defendant's present attorney, should not be good service of the same. The application is substantially to set aside the judgment signed by the lessor of the plaintiff under these circumstances. The original attorney was Raynes; the cause had gone down for trial, and a verdict had been recovered for the lessors of the plaintiff. A rule was then obtained for a new trial, and the

(a) 2 N. R. 509.

(b) See *Garratt v. Hooper*, ante,

Vol. 1, p. 28, and *Roberts v. Spurr*,
 ante, Vol. 3, p. 551.

rule was drawn up in the name of another attorney, Nickols, no order having been obtained for changing the attorney; and the question is, what is the nature of that default on the part of the defendant, that is, of obtaining the rule nisi for a new trial without an order for changing the attorney. The lessors of the plaintiff, although notice was given of this rule for a new trial, thought fit to treat it as a nullity, and to sign judgment, and it is to set aside that judgment that this application is made. On the argument in the case, the application was resisted on the ground that the defendant could not have availed himself of the service of the rule when the argument on the rule for a new trial came on, and that therefore the plaintiff was entitled to treat it as a nullity. On behalf of the application, it was contended by *Mr. Whitehurst*, that it did not appear that the defendant was wrong, as non constat, that Raynes was not still the attorney on the record. But that is the very ground of the objection, as the rule for the new trial was obtained by a different attorney, and no order had been procured to change the attorney; there is, consequently, nothing in that argument, and it is plain that Nickols was the person who obtained the rule. Several cases were cited by *Mr. Humfrey*, the first of which was that of *Girdens v. More*. There, cause was shown against a rule to discharge a defendant out of custody, and a preliminary objection was taken, that the rule had been moved for by a new attorney, without obtaining an order to change the former; but there, the application was made to the court, and the objection prevailed. It does not, however, follow, from that decision, that because a party, by going before the Court, can take the objection, that therefore he may consider the step he objects to as no step at all. Indeed it is quite the reverse, and that decision only shews, that when the parties come before the Court no proceeding by a new attorney is considered to be of avail, unless there has been an order for

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changing the attorney. The next case is that of *Lovegrove v. Dymond*. The application of that case is still more remote from the argument; for, there, a rule nisi for judgment as in case of a nonsuit was obtained, and it was objected that the plaintiff could not be heard to shew cause, as he had obtained an order to change the attorney, which he had not served. However, there the plaintiff was personally in Court, and was not only heard, but successfully heard. That can, therefore, have no tendency to shew that this proceeding was a nullity. There is also the case of *Phillips v. Berkely*, where my brother *Littledale* says, that it is a good objection to granting a rule, that there had been no order for changing the attorney served. And so indeed it might be, provided it was brought under the notice of the Court; but that case does not shew that this plaintiff may treat this rule for a new trial as a nullity. There were two other cases cited, but neither of them goes the length of proving that this step was a nullity. In one of them, *Powel v. Little*, it was decided, that where there had been a change of the plaintiff's attorney in private, without the authority of an order, a payment of the debt by the defendant, to the original attorney, was a good payment. Another case which was not cited was that of *Robson v. Eaton (a)*, where it was held, that a payment by the defendant to the plaintiff's attorney on the record, without the authority of the plaintiff, was not a good payment. Neither of these cases have any tendency to support the argument, that the rule for a new trial, having been obtained by a new attorney, without an order to change the attorney, that it is therefore to be considered a mere nullity. When the case is considered, what in effect has been done? There is no reason to say that the Court has been imposed on. An objection has been taken on moving for the rule for a new trial to what was done at the

(a) 1 T. R. 62.

trial; in fact the Court attended to the counsel who moved for the rule, and it is immaterial whether he was instructed by A. or by B. Suppose there had been a total mistake, and the attorney had ~~not~~ been aware of the necessity of having an order to change the attorney, and Nickols had moved for the rule in perfect ignorance of that necessity, could it be said that the Court would not, on imposing some terms, have entertained the application for a new trial, and would not have left the rule for a new trial in its full vigour, just as if it had been moved for by means of the attorney on the record, Baynes? If that had been done, there could be no right to treat that rule as a nullity, and to sign judgment. It seems to me, therefore, that there was no ground for considering the rule for a new trial as a nullity, and consequently, that the lessors of the plaintiff had no right to sign judgment. As to the remaining part of the rule, I shall not interfere. It appears that *Nickols* is now, in due form, the attorney on the record, and if the lessors of the plaintiff can make any use of the mistake committed, when the time comes to shew cause against the rule for a new trial, he must be at liberty to do so. I shall, therefore, only set aside the judgment and subsequent proceedings, but without costs, as the defendant has been in error.

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Rule absolute accordingly.

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HAYES applied for leave to amend the notice for the purpose of being admitted as an attorney, which had been given by a gentleman named Collins. The care of giving the necessary notices had been entrusted to the town

The Court will allow an attorney's notice for admission to be amended, by introducing the name of one of the persons

with whom he served his clerkship, and which had accidentally been omitted.

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agent, and by some accident the notice had stated that Mr. Collins served his time to a Mr. Helm, an attorney at Worcester; whereas, he had been originally articled to a gentleman named Saunders, a partner of Mr. Helm, and on the death of the former gentleman, he had been assigned to the latter. If the notice were amended according to the facts, no injury could result, and every object of giving the notice would be attained.

WILLIAMS, J.—It seems to me that no one can be misled by the amendment sought to be made in the present case. I think the application is reasonable, and may therefore be granted.

Application granted.

CURTIS v. Marquis of HEADFORT.

De injuriâ is a good replication on general demurrer to a plea, in an action on a cheque, that it was given for a gambling debt.

THE declaration was on a cheque for 250*l.*, drawn by defendant on Messrs. Puget and Bainbridge, and by him delivered to one Ephraim Bond, through whom it came to the plaintiff, and which cheque was stated to be dishonoured.

The plea was, that the cheque was drawn, and given to Ephraim Bond, before the 31st day of August, 1835, (the day of the passing of the stat. 5 & 6 Will. 4, c. 41.) as a security to the said Ephraim Bond, and one Robert Bond, and one Edward Bond, for money lost at play to the said Ephraim, Robert, and Edward Bond. To this plea the plaintiff replied *de injuriâ suâ propriâ*, &c., to which the defendant demurred *generally*. The ground of demurrer stated in the margin was, that the replication was inapplicable to the plea, which was not in excuse of the performance, but in denial of the binding effect of the contract. A rule to set aside this demurrer as frivolous was obtained on an affidavit, which pointed out

that the demurrer was *a general one*, and stated the deponent's belief that it was frivolous, and intended merely for delay. In answer to this, there was a counter affidavit that the demurrer was by advice of counsel and *bonâ fide*, and that the deponent believed the facts of the plea to be true.

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C. Cooper shewed cause.—First, As to the demurrer being general. The improper use of the replication *de injuriâ* is a subject of general demurrer: *Fursdon v. Weeks* (a), *Hooker v. Nye* (b.) The former case shews that it was not considered a matter of mere form under the statute of 27 Eliz. c. 5; and it is only requisite to read the defects enumerated in the statute 4 Anne, c. 16, as matters of form, to see that it is not included in them: but *Hooker v. Nye* has expressly determined this point; Lord *Lyndhurst*, C. B., in that case observes, that as *Fursdon v. Weeks* was after the 27 Eliz., c. 5, and was decided on general demurrer, it shews that this objection is not mere matter of form but of substance, or it would have been within that statute, and in his judgment he shews that it is not one of the defects within the remedy of the statute 4 Anne, c. 16. [*Coleridge J.*—The plea in that case was very different from the present. It was a plea claiming an interest in land.] The nature of the objection to the replication was the same. The objection made to the present replication is not that it is multifarious, but that it is altogether inappropriate.

Second, The replication *de injuriâ* is not appropriate to the plea. Until the recent cases in the Common Pleas and Exchequer, this replication has been deemed peculiar to actions of tort, and in *Crogate's* case, 8 Co. 66, is said to be “properly when the defendant's plea doth consist merely upon some matter of excuse,” and the cases of

(a) 3 Levinz. 65.

(b) 1 C. M. & R. 258.

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assumpsit in which this replication has been allowed have been professedly decided on the same principle. It is perhaps too late to contend now, that this replication cannot be properly used in assumpsit, but it may still be shewn that it is inappropriate to a plea like the present, which does not confess and avoid the cause of action, but altogether denies that it ever existed. The action is not founded on an express promise. The promise arises, if at all, by implication of law; it being the duty of the drawer of a cheque to pay the amount of it to the bearer in default of the bankers, but the plea is in effect, that by the operation of the statute of 9 Anne, c. 14, the cheque being given for a gambling debt is void, so that no promise to pay it can arise. It is not necessary, on shewing cause against this rule, to consider whether the statute of the 5 & 6 Will. 4, c. 41, has a retrospective effect on gaming securities given before the passing of that act. This question is now before the Court of Queen's Bench, in the case of *Hitchcock v. Way* (a), which is not yet decided. The present case is clearly distinguishable from the cases in which such a replication has been allowed. In each of those cases a *prima facie* cause of action was disclosed on the face of the plea. In *Noel v. Rich* (b), the action was by an indorsee against the drawer of a bill. The plea did not deny that the bill was duly made, but consisted of matter of defence arising entirely after the making of the bill. The Court of Exchequer held that the plea was ill, and the opinion expressed as to the goodness of the replication was unnecessary. In *Isaac v. Farrar* (c), the action was by an indorsee against the maker of a promissory note, the plea admitting that the defendant drew and delivered the promissory note as

(a) This case has been since determined (2 N. & P. 72), the Court of Queen's Bench having decided that the act of 5 & 6 Will. 4,

c. 41, is not retrospective.

(b) Ante, Vol. 4, p. 228.

(c) Id. p. 750.

stated in the declaration, avoided the effect of the admission, by shewing that the note was made and endorsed without value *bonâ fide* paid, whereby the defendant was excused from performing the promise. The Court in giving judgment, that the replication *de injuriâ* was sufficient, expressly distinguished the case from *Solly v. Neish* (a), and *Whittaker v. Mason* (b), in which the plea denied the contract as alleged. In *Griffin v. Yeates* (c), which was decided immediately after *Isaac v. Farrar*, the action was by the indorsee against the acceptor of a bill of exchange, and the plea was matter of excuse; for, admitting the acceptance, it alleged that the acceptance was for the accommodation of the drawer, and that the drawer indorsed to the plaintiff without consideration. On the other hand, in *Whittaker v. Mason*, which was an action of assumpsit for not paying for books sold on certain terms, one of which was stated to be, that they were to be settled for by bills, (with security if required), to which the defendant pleaded, that by the custom of the trade, the security in such conditions mentioned, if the seller should require the same, was to be required *before or at the time* the goods were delivered and taken away by the purchaser, and not afterwards; and that the plaintiff did not *before or at that time* require security, and the plaintiff replied *de injuriâ*. The replication was held to be bad, on the ground that the plea did not admit the promise stated in the declaration, and excuse the non-performance of it, but did in effect deny that such promise was ever made. Here the plea denies that the implied promise ever arose. [Coleridge, J.—Is there any case of assumpsit in which the objection to the replication *de injuriâ* has been decided to be bad on general demurrer?] I am not aware of any, but all the cases on this point have been decided

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(a) Ante, Vol. 4, p. 248.

(b) Ante, p. 429.

(c) Ante, Vol. 4, p. 647.

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on the general principle now under discussion, and not on the special ground of multifariousness and duplicity.

To return to the principal point, the action of *assumpsit*, although said to be an action of trespass upon the case, is (as in the writ of summons) more properly called an action on promises, and is as much an action of contract as an action of debt or covenant. Compare the mode of pleading in each action. Lunacy, incompetency from intoxication or other cause, and coverture, might formerly be given in evidence under the general issue *non assumpsit*, as they might under the plea *non est factum*. It is now necessary, in the one kind of action as in the other, to plead these defences specially. To pleas of lunacy, incompetency, or coverture, which are altogether in denial of the contract, (but not more so than the present plea), can *de injuriâ* be replied in *assumpsit*? and if so, can this replication be pleaded to the same pleas, in debt on specialty or covenant? There is no precedent to be found for such a replication. The new rules of pleading, in requiring that matters of defence formerly given in evidence under the general issue shall be specially pleaded, do not alter the nature of these defences. They are (as they always were) in denial, and not in excuse of performance of the contract. In conclusion, whatever may be the inclination of the opinion of the Court, as to the goodness or badness of this replication, it is at all events a fit question for argument, and the demurrer cannot be said to be frivolous.

COLERIDGE, J.—Feeling, as I do, that this case has been most ably investigated, and being bound also to remember the state of the special paper, and of the delay that would accrue were I not to determine it, and having, moreover, a very clear opinion on the point, I feel that I am called on to decide it. The question is not, whether the replication is multifarious, nor whether there is any other objection in

point of form ; the only question is, whether the replication is substantially bad ; that is, whether, under any circumstances, this replication to this plea can be replied. A few years ago, it would not have been held a good replication ; several late cases have, however, decided that it may be pleaded in assumpsit ; but then it is said that there must be some admission of the original promise in order to authorize it. I do not, however, see the good sense of that position. It does not depend on the doctrine laid down in *Crogate's* case (a), but on the misunderstanding of that doctrine. That case determined that this replication was good when the plea consisted merely of matter of excuse, and of no matter of interest whatever (b). I do not understand the distinction which Mr. *Cooper* insisted on when he said, that in assumpsit this replication might be good in certain cases, but could not be so in this case. That argument cannot be founded on *Crogate's* case. The rule there laid down, when applied to assumpsit, falls to the ground ; and I think that I am warranted in saying so by the case of *Noel v. Rich*, which is precisely similar to the present. The only distinction which Mr. *Cooper* makes is this, that this cheque was bad in its inception, whereas in that case the bill of exchange was good in the first instance, but there was no right of action in the parties who then sued on it. That, I think, is a distinction without a difference. The Court in that case said, that *de injuriâ* was substantially a good replication. The plea denied that there was any promise as between *Noel v. Rich*, as stated in the declaration, yet it was held that the replication of *de injuriâ* was good, and that if there was any objection at all it was in point of form only. Lord *Abinger* there says :—" I am also inclined to think that the replication is good, and that the objection made

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(a) 8 Rep. 66.

(b) See *Bardons v. Selby*, in er-

ror, 9 Bing. 756; 3 Tyr. 430; 1

Cr. & Mees. 500; 3 B. & Ad. 2.

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to it is matter of form. Formerly, under the general issue, most defences might be given in evidence, but since the Court promulgated the general rule for the purpose of simplifying trials at nisi prius, that all defences must be pleaded, the general issue now only puts in issue the making of the promise; and in actions on bills of exchange there is, strictly speaking, no general issue: but if the promise has been broken, the defendant must plead his defence specially. If the Court is right in throwing the burthen of proof on the defendant, the plaintiff by his replication certainly does so; he in fact says, that he denies the cause which the defendant alleges he had for breaking the promise laid in the declaration." That is all that is done in this case; the defendant has set out facts which make a clear defence, and the plaintiff says those facts do not exist. Why may he not do that? We have nothing now to do with the multifariousness of the replication. Again, *Alderson, B.*, says:—"It appears to me that the replication is good. The defendant says that the plaintiff has no right to maintain his action for the cause stated in the plea. The plaintiff, in reply, alleges that the cause stated in the plea is not true. Whether in point of form this replication is right or not, is a different question." That case, therefore, seems to me a direct authority in principle, and also to be on all fours with the present, and therefore, I think this replication is good on general demurrer (a).

(a) See *Parker v. Riley*, ante, p. 375.

1838.

GRATER v. COLLARD.

ROGERS shewed cause against a rule nisi obtained by *James* for setting aside the inquisition in this case, and granting a new writ of inquiry, or for increasing the verdict found to the amount of forty shillings, on the ground of misdirection by the under-sheriff, before whom it had been executed. It was an action for slander on an attorney, and the defendant suffered judgment by default. After consulting some time, the jury inquired what was the lowest amount of damages which would entitle the plaintiff to costs. The under-sheriff told them that any sum, however low, would, under the circumstances, entitle the plaintiff to costs. The jury, accordingly, found a verdict for one farthing. It was now contended, that although the information given by the under-sheriff to the jury as to costs was wrong, according to the provisions of 21 Jac. c. 16, s. 6, yet this was not a "misdirection" which could be considered as a ground for making the present rule absolute. It was merely an intimation as to costs, over which the jury had no jurisdiction.

Where, on the execution of a writ of inquiry, in an action for slander, the jury are incorrectly informed by the under-sheriff that any amount of damages will carry costs, and they find for less than 40s., that is no ground for a new writ of inquiry, or for increasing the amount of the verdict.

James, in support of the rule, contended that the costs were part of the damages, and, therefore, as the inquiry before the jury was as to the amount of the damages to be assessed, the incorrect information given by the under-sheriff, which had led to an undue diminution of costs, must be considered as a misdirection. He cited 2 Tidd's Practice, p. 979, edit. 8, and *Phillips v. Bacon* (a). Perhaps the under-sheriff was not bound to give the jury any information on the subject of costs, but if he chose to give any, he was bound to give correct information. If he gave incorrect information, it amounted to a misdirection. The present rule ought, therefore, to be made absolute.

(a) 9 East, 298.

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COLERIDGE, J.—There is no ground stated for a new writ of inquiry in this case, except a misdirection, and in order to constitute a misdirection, it is necessary that the jury should have received wrong information on some matter which is directly in issue, or which is substantially connected with the finding on the issue.

It has been contended, that there has been a misdirection on two grounds, first, that the costs being essentially part of the damages, they are directly within the issue. If that is so, then, wherever a judge refuses to give information to a jury respecting costs, he withholds proper information from them, and consequently has misdirected them. Now the practice is inveterate, and supported by the highest authority, to refuse such information. I shall not therefore disturb it, and must suppose that costs and damages for this purpose are quite distinct matters. Then if not directly within the issue, are the costs so much a part of the issue as that, to give the jury wrong information respecting them constitutes a misdirection? I can conceive some cases in which such wrong information might mislead the jury, but let us see whether the present is such a case. Here, the jury asked what amount of damages would carry costs; they were then misinformed, and told that any sum would carry costs. Now, if their object was only to give the plaintiff damages, it was still left open to them to give whatever damages the plaintiff was justly entitled to, and therefore as to that particular point they were not misled. But if their object was to give such an amount of damages as would secure to the plaintiff his costs, that was doing what they had no right to do. Consequently, the wrong information given does not come under either sort of misdirection which I at first adverted to. As I cannot send down the cause for a new inquiry, unless there was a clear misdirection, the rule must be discharged.

Rule discharged.

1838.

Ex parte DARBELL.

J. JERVIS moved, on the part of an articted clerk to an attorney, that he might be discharged from his original articles, and that other articles into which he had entered should be declared valid and enrolled accordingly. The attorney, to whom he had been originally articted, and with whom he had served a portion of his clerkship, had become insane. The effect was, that the articles could not be assigned. He had been articted anew to the partner of his late master, and the object of the present application was to render that binding available.

Where an attorney to whom a clerk has been articted became insane during the clerkship, the Court allowed fresh articles entered into with another attorney to be enrolled.

WILLIAMS, J., made an order to the effect prayed.

Order accordingly.

APPERLEY v. MORSE.

GALE shewed cause against a rule nisi obtained by *Gray* for judgment as in case of a nonsuit. It was a country cause, and issue was joined in Michaelmas Term. The plaintiff gave no notice of trial. The rule was obtained in the present term. He cited *Gough v. White* (a), *Smith v. Miller* (b), and *Evans v. Barnard* (c).

Issue joined in a country cause in Michaelmas Term, and no notice of trial given, it is not too early to move for judgment as in case of a nonsuit in the following Easter Term.

Gray, in support of the rule, cited *Robinson v. Taylor* (d).

Cur. adv. vult.

WILLIAMS, J.—The single question in this case was, whether a rule for judgment, as in case of a nonsuit moved for this term in a country cause, was premature, the issue having been joined in Michaelmas Term. The doubt was,

(a) 2 M. & W. 363.

(c) 3 M. & W. 276.

(b) Ante, Vol. 6, p. 154.

(d) Ante, Vol. 5, p. 518.

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whether there ought not to be two *entire* terms between the term in which issue was joined, and the term in which the rule was moved for ; and supposing it is so, it was said that this motion was premature, as Hilary Term would make one of those two terms, and the present term the other ; and that next term would, in consequence, be the earliest time at which this rule could be moved for. The doubt has arisen on two cases in the Court of Exchequer, to which reference was made in argument, the latter of which, *Evans v. Barnard*, purports to reconsider the case of *Smith v. Miller*. Those cases certainly do seem to shew that there must be two entire terms intervening. However, there is some variation as to the supposed rule when applied to two assizes passing over, but in *Evans v. Barnard* that was certainly restricted to the case where issue was joined in an issuable term. On the other hand, the case of *Robinson v. Taylor* was referred to, which was an application in this Court before my Brother *Littledale*. In that case, which was a country cause, the issue was joined in Easter Vacation, and the rule was moved for in Michaelmas Term, and consequently there was only one entire term intervening, and my Brother *Littledale* was of opinion that the motion was not premature. Of course, nothing can well be more immaterial as to what the rule is ; but it is very material that it should be settled somehow for the ease and comfort of parties making these applications to the Court. I have made inquiry of the other Judges of the Court, and I have had much assistance as to the practice from the Masters both of this Court and of the Court of Exchequer, and I have also spoken to one or two of the Barons of that Court. The result is, that I must decide that in a country cause where issue is joined in *Michaelmas* Term, the motion for judgment as in case of a nonsuit may be made in the Easter Term following, but I shall not express my opinion beyond this decision.

Rule absolute.

1838.

PIERSON v. CHESSUN.

MANSEL shewed cause against a rule nisi obtained by **Wallinger**, for judgment as in case of a nonsuit. Issue was joined in Michaelmas Term, but no notice of trial given. The venue was in London. *Mansel* submitted that the cases of *Fox v. M'Culloch* (a), and *Gough v. White* (b), shewed that the present application was too early, as two full terms had not elapsed after issue joined.

Issue joined in a *term* case in Michaelmas Term, notice of trial not being given, it is not too soon to move for judgment as in case of a nonsuit in the following Easter Term.

Wallinger, in support of the rule, contended that those cases only decided that the application in the present case would be too early, if issue had been joined in Michaelmas Vacation. Here, however, issue was joined in Michaelmas Term, and therefore those cases did not apply.

WILLIAMS, J.—The present application appears to me to be regular. In the former case cited, the issue was joined in Trinity Vacation, and the other Judges, as well as myself, were of opinion that an issue in the vacation could not be considered as of the preceding term, and therefore it was too early to move for judgment as in case of a nonsuit in the following Hilary Term. Here, however, the issue was joined in Michaelmas Term itself, and not the vacation of that term, and therefore I think the present rule has been properly obtained.

Rule discharged on a peremptory undertaking (c).

(a) Ante, Vol. 5, p. 526.

(b) 2 M. & W. 363.

(c) See *Apperley v. Morse*, ante, 505.

1838.

FILEWOOD v. CLEMENT.

Permitting a defendant in the custody of the sheriff, against whom a ca. sa. has been lodged, to go out of prison, is a *voluntary* escape, although the act of the sheriff was caused by mistake.

A sheriff, therefore, has no right to retake a defendant; and if he does, the caption being a nullity, lapse of time will not be an objection to the defendant's discharge.

JAMES shewed cause against a rule nisi obtained by *Whitehurst*, for discharging the defendant out of custody, and compelling the sheriff to pay the costs of the application. The affidavits disclosed that the defendant being in the custody of the sheriffs of London, on a *capias* at the suit of a person named *Holcroft*, a ca. sa. at the suit of the plaintiff *Filewood*, was, on the 1st of January, lodged at the Secondary's office. The latter writ was by mistake entered in a book kept at the office, in which writs to be returned *non est inventus* ought to be entered. The proper course was to enter it in the index book, which was kept in order to ascertain in what causes the prisoners were respectively detained. A notice of the defendant being in custody was indorsed on the ca. sa. *Holcroft*, who, it appeared, had effected the arrest of the defendant with a friendly purpose, in order that he might take the benefit of the insolvent act, finding that opposition was probable, withdrew the *capias*. This was on the 8th of January, and on the evening of that day, the gaoler having searched the index book, and found no detainer against the defendant, compelled the latter to leave the prison. The error in the entry was discovered the next morning. A fiat in bankruptcy had issued against the defendant on the 21st of December, and on the 10th of January, he surrendered, and duly obtained his protection pursuant to 6 Geo. 4, c. 16. On his way to the bankrupt court, for the purpose of attending the committee, on the 11th of January, he was re-taken on a warrant issued by the sheriff under the ca. sa. An application was made on the 19th of March, at chambers, to discharge the defendant out of custody. The learned judge refused to interfere, on the ground of the delay on the part of the defendant in making his application. The present rule was obtained on the 25th of April.

James now contended that the application was too late. He cited *Fownes v. Stokes* (a). Supposing the Court to be of opinion, that the application was not too late, the question then arose, as to whether this was a negligent escape or not. If it was a negligent escape, the sheriff had a right to retake the defendant. It was submitted that, under the circumstances of the case, this must be considered as a negligent escape, because it arose from a mere mistake in entering the writ in a wrong book. He cited *Bonafous v. Walker* (b), where it was held, that an escape from the rules of the King's Bench Prison, without the Marshal's knowledge, is not a voluntary escape. Here it could not be contended, that the escape had been effected with the knowledge of the sheriff, because, in consequence of negligence on the part of the person in the office, proper means had not been taken to let the sheriff know that the defendant was actually in custody. For these reasons, the present rule ought to be discharged.

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Whitehurst in support of the rule contended, that with respect to the delay imputed to the defendant, the process on which the arrest had been effected being final, the delay was immaterial. He cited *Barratt v. Price* (c), *Smith v. Sandys* (d), *Mortimer v. Piggott* (e), and *Tarber v. French* (f). As to the second point, it was submitted that this escape must be regarded as voluntary. It could not be said here, to have been against the will of the sheriff, which was essential to constitute a negligent escape. On the contrary, the gaoler had compelled the defendant to go out of prison. He cited *Atkinson v. Jameson* (g), *Ravenscroft v. Eyles* (h), and *Allanson v. Butler* (i).

Cur adv. vult.

(a) Ante, Vol. 4, p. 125.

(b) 2 T. R. 126.

(c) Ante, Vol. 1, p. 725.

(d) Ante, p. 192.

(e) Ante, Vol. 2, p. 615.

(f) 4 Ad. & El. 362.

(g) 5 T. R. 25.

(h) 2 Wils. 294.

(i) 1 Sid. 330.

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WILLIAMS, J.—This was an application to discharge the defendant out of custody, and to compel the sheriff to pay the costs of the application. It appears, that the defendant was arrested, by virtue of a writ of *capias*, at the suit of a person named Holcroft, on the 4th of November. On the 1st of January, a writ of *ca. sa.* was lodged in the Secondary's office at the suit of the present plaintiff. By mistake, no entry was made of the latter writ in the index book, which is kept for the convenience of the office. On the 8th of January, the defendant was discharged in the suit at the instance of Holcroft, and he was then let out of custody by the gaoler. This was occasioned by there being no entry of the *ca. sa.* in the index book. On the 9th of January the mistake was discovered, and on the 11th, he was retaken on a warrant of the sheriff. At that time he was under the protection of a fiat of bankruptcy, for he was in the course of examination by the commissioners. Several points were discussed during the argument, which, it seems to me, are not essential to the consideration of this case. The material question first is, whether this was an escape. No doubt that it was an escape. Whether he was turned out or let out is immaterial, as he went out. The question then is, what sort of an escape it was; whether it was voluntary or negligent. In Mr. Impey's book on the Office of Sheriff, page 167, that author says, "negligent escape is where one is arrested, and afterwards escapes against the will of him that arrested him or had him in custody, and is not pursued by a fresh suit, and taken again before the party pursuing hath lost sight of him." That is a fair and reasonable definition of what is negligent; and it seems to me that the facts of the case here exclude the idea of this being a negligent escape. It cannot be said that this man escaped against the will of the sheriff, because, unquestionably, the gaoler either turned him out or let him out, strictly with his consent. And this point, I find, has been under

consideration in *Wilkinson v. Salter and Another* (a). There, the escape was by the appointment of a person in execution to be turnkey in the prison. Lord *Hardwicke* there said, "here is plain evidence of an escape, the only question is, whether this is a voluntary or a negligent escape. For, if it is a negligent escape, the sheriff may justify by recaption, but, if it be a voluntary escape, he may not justify; and this appears to me to be a voluntary escape, for, as he has been trusted with the keys of the prison, he may go out when he will." His Lordship there was of opinion, that this was clearly a voluntary escape. The question then is, what is to be the result of this escape, as far as the rights of the parties are concerned. There was formerly a question as to the right of the execution creditor, under such circumstances, to retake the defendant. That is, however, now set at rest by the 8 & 9 Will. 3, c. 27, s. 7, as by that section it is provided, "that if any prisoner committed in execution to either or any of the said respective prisons, shall escape from thence by any ways or means howsoever, the creditor or creditors at whose suit such prisoner was charged in execution at the time of his escape, shall or may retake such prisoner by any new *capias* or *capias ad satisfaciendum*, or sue forth any other kind of execution on the judgment, as if the body of such prisoner had never been taken in execution." Then the question is as to the right of the sheriff to retake him. In the case of *Allanson v. Butler* (b), the Court says, "if the party in execution escapes through negligence, he may be retaken either by the sheriff or by the plaintiff; but if he escapes voluntarily on the part of the sheriff, the sheriff cannot retake him, but the plaintiff can." Lord *Hardwicke* in *Wilkinson v. Salter*, already referred to, makes similar remarks. The case of *Featherstonehaugh v. Atkinson* (c) is to the same effect. *Ravens-*

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 v.
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(a) Cas. Temp. Hardwicke, 310.

(b) Sid. 330.

(c) Barnes, 373.

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croft v. Eyles (a), recognised the same principle. In *Atkinson v. Jameson (b)*, Lord *Kenyon* laid down the same principle. My opinion, therefore, being that the escape here was voluntary, the sheriff had no right to retake the defendant, and, consequently, such retaking was purely void. The defendant has thus been wrongfully in custody from that time. An objection was taken, that as this proceeding was an irregularity, it ought to have been more promptly brought before the Court, and that the delay ought to operate against the defendant, so as to prevent his discharge. I think that cannot be, as he has not been in legal custody for one hour, for the whole proceeding was a nullity. In such a case, the lapse of time does not waive the objection, and I am bound to give him the advantage of it. In *Mortimer v. Pigott (c)* it was held, that where a defendant is in custody under a writ which is a nullity, the lapse of time does not waive his right to apply for his discharge. In my opinion, the rule ought to be made absolute for his discharge, but without costs, unless he undertakes to bring no action. If he will give that undertaking, the rule may be absolute with costs.

Rule absolute accordingly.

(a) 2 Wils. 294.

(b) 5 T. R. 25.

(c) Ante, Vol. 2, p. 615.

In re GARLAND.

The Court will not summarily enforce an undertaking given by an attorney who is also a solicitor, in a suit in Chancery.

PALMER shewed cause against a rule nisi obtained by *Kelly*, requiring Garland, an attorney of the Court, to perform his undertaking. It appeared that a person named Croxford had contracted to sell certain real property to a person named Elgar. Some delay arising on behalf of the vendee, the vendor filed a bill for specific performance

of the agreement of sale. An answer not having been duly put in, Elgar was in contempt, and in order to prevent an attachment, Garland, his solicitor, who was also an attorney of this Court, gave his undertaking to pay certain costs in the suit. Croxford was afterwards convicted of felony and transported for fourteen years; and the present application was made at the instance of Gridley, the solicitor of Croxford, to compel the performance of Garland's undertaking. *Palmer* contended, first, that as Croxford was a convicted felon, he could not appoint an attorney, and therefore Gridley had no locus standi in Court; and secondly, that as the undertaking had been given in the Court of Chancery, the proper remedy against Garland must be sought in that Court.

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Kelly was heard in support of his rule.

Cur. adv. vult.

WILLIAMS, J.—This was an application against Garland, an attorney of this Court, on a rule to shew cause why he should not pay to Croxford, or his attorney, certain costs pursuant to his undertaking, and why he should not complete a purchase according to that undertaking. It appeared on the affidavits, that Croxford was possessed of a small real property which he wished to dispose of, and that Elgar, who was Garland's client, became the purchaser or rather attempted to become so. Some delay took place as to the title of the property, and a bill was filed in Chancery by Croxford against Elgar for a specific performance of the agreement of sale. For some cause, Elgar did not put in an answer to the bill, and thus he was in contempt, and an attachment issued to compel him to put in an answer. For the purpose of getting rid of the attachment, Garland gave the undertaking in question, to pay the costs and to complete the

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purchase. It further appeared on the affidavits, that in that state of things Croxford was convicted of felony, and was transported for fourteen years. Long subsequent to that time this application was made, and the question is, whether the undertaking can be enforced as against Garland? Supposing it was possible to draw a line at the point where the undertaking was given, and that the subsequent conviction for felony would not affect the right of the attorney of the convict to appear in Court at all, on which points I say nothing, I am clearly of opinion that this rule cannot be made absolute. It appears on the affidavits and on the undertaking itself, that Garland is a solicitor of the Court of Chancery as well as an attorney of this Court. That undertaking, therefore, whether or not it can be avoided by what has subsequently taken place, is, at all events, an undertaking given in a matter in Chancery, and one over which the Court of Chancery has jurisdiction; and I must assume that if any thing has been done wrong, the Court of Chancery will enforce it. I think that I have no business to meddle in the matter, and that if there is any remedy at all against Garland under the circumstances, on which point I give no opinion, it is in the Court of Chancery.

Rule discharged.

MORRIS v. JAMES.

Where a plaintiff is improperly delayed in his action, in consequence of the defendant's attorney not fulfilling his undertaking to enter an appearance in due time, the Court will not compel the latter to give security for the debt and costs conditional on the plaintiff's obtaining a verdict.

BUTT moved for a rule to shew cause why the defendant's attorney should not give security for the debt and costs claimed by the plaintiff, in the event of a verdict being recovered by him. The facts disclosed in the affidavit supporting the application were, that when it was proposed to serve the defendant with process, his attorney

Where a plaintiff is improperly delayed in his action, in consequence of the defendant's attorney not fulfilling his undertaking to enter an appearance in due time, the Court will not compel the latter to give security for the debt and costs conditional on the plaintiff's obtaining a verdict.

interfered and gave his undertaking to enter an appearance, in order to prevent the personal service from being effected. Different facts were stated which tended to shew that in consequence of the attorney's delay in entering the appearance, the plaintiff had been prevented from trying his cause at the last assizes, and that now, in the event of obtaining a verdict, the insolvent state of the defendant would most probably prevent his ever obtaining any fruits of it.

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WILLIAMS, J.—No precedent has been shewn for such an application as the present, and I certainly am aware of none. It seems to me, that if there is any remedy, it is against the attorney on his undertaking, and that must, of course, be an application in a different form.

Rule refused.

REG. v. MATTEY.

GRAY applied for an attachment for non-payment of costs pursuant to the Master's allocatur. The rule on which the Master had allowed the costs, required them, when taxed, to be paid to the late high-sheriff of the county of Bucks. The high-sheriff having gone out of office, a power of attorney to demand the costs pursuant to the rule, was executed by the under-sheriff after the high-sheriff had left office. Under the authority of this power of attorney, a demand of the costs was made, and the defendant refused to pay them. *Gray* contended that the power of attorney so executed after the high-sheriff had gone out of office, was sufficient, in the same manner that an assignment of a bail-bond, under similar circumstances, would be good.

A demand of costs, which, by the rule, are payable to a high-sheriff, made under the authority of a power of attorney executed by the under-sheriff after the high-sheriff has gone out of office, is sufficient to support an attachment.

WILLIAMS, J.—I think the attachment ought to go.

Rule granted.

1838.

Ex parte BAYLEY.

The 15th of April, which by 11 Geo. 4 & 1 Will. 4, c. 70, s. 6, is constituted the first day of Easter Term, falling on Easter Sunday, a delivery, three days before the 18th April, of the notices for the admission of an attorney, was held to be a sufficient compliance with Reg. Gen. H. T. 2 Will. 4.

W. H. WATSON made an application on the part of an articulated clerk, for leave to insert his name in the list of persons seeking to be admitted as attornies in Trinity Term. By 5 Reg. Gen. H. T. 6 W. 4 (a), it was ordered "that three days at least before the commencement of the term next preceding that in which any person not before admitted shall propose to be admitted an attorney of either of the Courts, he shall cause to be delivered at the Master's or Prothonotary's office, as the case may be, instead of affixing the same on the walls of the Courts as now required, the usual written notices." In the present case, the notices had not been delivered in due time, if Sunday the 15th was to be construed as the first day of Easter Term, as they had been delivered three days before the 18th of April; but they had been delivered in due time, if Wednesday the 18th was considered as the first day of the term. Great uncertainty existed as to which of those days ought to be considered the first day of the term, for doubts had arisen with respect to the construction to be put on the 11 Geo. 4 & 1 W. 4, c. 70, s. 6, in connexion with 1 W. 4, c. 3, s. 3, & Reg. Gen. H. T. 2 W. 4, (b). Under these circumstances, it was submitted, that the notices ought to be considered as delivered in due time pursuant to the rule of court.

WILLIAMS, J.—I think the notice is sufficient.

Application granted.

(a) Ante, Vol. 4, p. 554.

(b) Ante, Vol. 1, p. 423.

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Ex parte LYONS.

MANSEL applied on the 25th of April, that an articted clerk named Lyons might be allowed to give in the answers pursuant to Reg. Gen. E. T. 6 Will. 4 (a), nunc pro tunc. The affidavit, on which, the application was founded stated that the applicant had been articted to his father, and served the whole five years. Mr. Lyons had expected his father in town on the 18th of April, but he did not arrive before the 22nd of the month. The Secretary of the Law Institution had fixed Saturday the 21st as the last day for receiving the answers. As they could not be procured without the father's presence in London, of course, the rule could not be strictly complied with. Immediately after the father's return the answers were procured, and tendered to the Secretary of the Law Institution. That gentleman, however, declined receiving them, without the authority of the Court. It appeared, that the examination would take place on the 1st of May.

Where the delay on the part of an articted clerk in sending in the answers required by Reg. Gen. E. T. 6 Will. 4, has been caused by the unexpected absence of the attorney with whom the articles were served, the Court will allow them to be sent in nunc pro tunc.

WILLIAMS, J.—I think the application is reasonable: the answers may now be sent in.

Application granted.

(a) Ante, Vol. 5, p. 1.

WALTER v. NICHOLSON.

W. H. WATSON moved on behalf of the defendant for a rule nisi under 1 & 2 Will. 4, c. 58, s. 1 (the Interpleader Act). It was an action against the sheriff of Durham for negligence in the sale of certain goods seized under a writ of fi. fa. The affidavit of the defendant stated, that he claimed no interest in the subject matter of the

The 1st section of 1 & 2 Will. 4, c. 58 (the Interpleader Act), does not apply to actions for unliquidated damages.

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suit, and that he expected to be sued by the assignee of the bankrupt from whom the warrant of attorney supporting the judgment and execution had been obtained. The affidavit contained the usual denial of collusion required by section 1. The claim here was for unliquidated damages, and it might be a matter of doubt whether such a claim was within the meaning of section 1 of the Interpleader Act. The words of the section were in the preamble applicable to "a person sued at law for the recovery of money or goods wherein he has no interest;" and by the enacting part of the section the applicant is required to swear that he "is ready to bring into Court, or to pay or dispose of the subject matter of the account in such manner as the Court (or any judge thereof) may order or direct." There might be some difficulty in considering this claim as money or goods, or in the defendant swearing himself to be ready to bring into Court, or to pay or dispose of the subject matter of the action, since the amount of damages to which the plaintiff would be entitled must depend on the verdict of a jury.

WILLIAMS, J.—It appears to me that the provisions contained in section 1 of this act clearly refer to claims to property in its nature distinct and tangible, and not to a claim like the present, which consists only of unliquidated damages. I think, therefore, I ought not to grant a rule.

Rule refused.

DOE *d.* AVERY *v.* ROE.

Where an attorney, who is the attesting witness to the counterpart of a lease, is afterwards concerned for the tenant in an action of ejectment brought by the lessor, the Court will, notwithstanding, compel him to make an affidavit of the execution of the counterpart, in support of an application for the usual landlord's rule, under 1 Geo. 4, c. 87, s. 1. *Quære*, whether the affidavit of the attesting witness is, in every case of such an application, indispensable.

R. V. RICHARDS shewed cause against a rule nisi obtained by *Butt*, calling on an attorney of the Court to shew

cause why he should not, within three days, make an affidavit of the execution of the counterpart of a lease, and pay the costs of the application. An action of ejectment had been brought by the lessor of the plaintiff against his tenant for the recovery of certain premises held by the latter. The lessor being desirous of obtaining the usual landlord's rule under 1 Geo. 4, c. 87, s. 1, an application was made to the attesting witness of the counterpart of the lease to swear to the due execution of that instrument. The attesting witness having now become the attorney for the tenant, he declined making the affidavit immediately, but requested the delay of a week. An affidavit of the execution was accordingly prepared, and at the expiration of the week it was tendered to the attorney, in order that he might swear it. This he refused to do, and the present rule was accordingly obtained. It was submitted, that the present application was an attempt to extend the jurisdiction of the Court further than any precedent warranted. The Courts had never been much inclined to compel persons to make affidavits. The only cases where such an interference had taken place, were those in which proceedings would be rendered totally inoperative, unless such affidavits were made, as for instance, where it became necessary to prove the execution of warrants of attorney, or of submissions to arbitration. But, in the present instance, all that the lessor of the plaintiff sought was to avail himself of the extraordinary security given by the statute in question. Whether he obtained this security or not, the proceedings in the action of ejectment might equally be carried on. The plaintiff would be equally capable of recovering his premises, which recovery was the substantial object of the action. Again, it could not be considered that such a step need be taken on behalf of the lessor of the plaintiff, for it appeared from the case of *Doe d. Gowland v. Roe* (a), that in order to obtain the

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(a) Ante, p. 35.

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usual landlord's rule provided by 1 Geo. 4, c. 87, s. 1, the execution of the lease may be proved by the affidavit of a person who is not the attesting witness.

Butt, in support of the rule, submitted, that the Court had clearly authority to interfere in the manner required in the present case. If this rule were not made absolute, the attorney would in fact defeat the object of the statute. As to the case of *Doe d. Gowland v. Roe*, there, the affidavit was made by a person, who had seen the execution of the instrument, although not by the attesting witness. According to the general rules of evidence, the affidavit of the attesting witness ought to be produced, and if this was to be considered as an exception to those rules, it was incumbent on the other side to shew why. In the case of *Weston v. Faulkner* (a), the Court compelled a subscribing witness to make an affidavit of the execution of an instrument attested by her. That was the case of a bond. In the case of *Jones v. Knight* (b), the Court would not allow judgment to be entered up on an old warrant of attorney without an affidavit of the attesting witness, or an affidavit verifying his hand-writing; although an affidavit verifying the hand-writing of the defendant, and an acknowledgment on the part of the latter of his signature were produced. There, *Abbot*, C. J., said, "that will not dispense with the necessity of an affidavit on the part of the attesting witness. In an action upon a bond, proof of the acknowledgment by the defendant that it is his deed will not do." Again, in *Clark v. Elwick* (c), the Court made absolute a rule upon a witness upon a submission to arbitration, to make affidavit of the execution. These cases clearly shewed, both the necessity for obtaining the affidavit of the attesting witness, and the practice of the Court to interfere in the manner required. Under these circumstances,

(a) 1 Price, 308.

(b) 1 Chit. Rep. 743.

(c) 1 Str. 1.

it was hoped, that the Court would interfere to compel the attorney to do that which in point of justice he was bound to do. With respect to the costs of the application, as the attorney had misconducted himself in this manner by refusing to make the required affidavit, it was but just that he should pay them.

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Cur. adv. vult.

WILLIAMS, J.—This was a rule to shew cause, why an attorney should not be called on, within three days, to make an affidavit of the execution of the counterpart of a lease, and why he should not pay the costs of the application. It was the affidavit of the attesting witness which was wanted for the purpose of founding on it an application by the lessor of the plaintiff, for the usual rule under the statute 1 Geo. 4, c. 87, s. 1. This rule was resisted, partly on the ground that it would be extending the jurisdiction of the Court further than it had ever yet been carried, and partly because it was unnecessary, as it was said not to be requisite to have the affidavit of the attesting witness to the execution of the lease. If it was a question simply whether the affidavit of the attesting witness were indispensably necessary, I should have much difficulty in deciding this case. In the case of *Doe d. Gowland v. Roe*, the affidavits in which case I have seen, and also in the case of *Doe d. Mayor of Rotherham v. Morgan (a)*, the affidavits in which case I have also seen, the application for the tenant to find the usual security was made successfully, although the affidavit of the attesting witnesses to the leases were not produced. In both these cases the attesting witnesses were unwilling to make the affidavits which was the only cause for their not being produced, and it was not because the witnesses were out of the realm or dead. Those

(a) Ante, Vol. 3, p. 690.

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cases, therefore, were precisely like the present; but in both, although the ordinary method of proof was not complied with, there was a person present at the execution of the lease and who could attest it. I need not say that if that had occurred on the trial of an action on the lease, the plaintiff must have been nonsuited, if he had not called the attesting witness, or had not accounted for his absence; and that it would have been the same had there been any number of persons produced who were present at the execution. If that therefore was the only question, I should have much difficulty in deciding this case, for, if once we depart from the strict rules of evidence, I do not know where we are to stop; and I cannot say that necessarily there must be the affidavit of one who was present at the execution. However, that point shall not assist the attorney who was the attesting witness in this case; for if a person becomes willingly the party to the execution of an instrument, he ought not, because he subsequently becomes the partisan of another by being his attorney, or because he is out of humour, to be allowed to frustrate the remedy which a third person has on the instrument. It was argued by Mr. *Richards*, that in cases of warrants of attorney and of submissions to arbitration, the Court would undoubtedly compel an attorney who was the attesting witness to the execution, to depose to that fact; but that was, because, in those cases there would otherwise be a total failure of a party's remedy, unless the affidavit of the execution was made; whereas in this case, no such result would be the consequence, as the action of ejectment would still proceed in the ordinary way. But I do not see that distinction. Here, there would be a total and entire failure of a remedy given by the provisions of an act of Parliament made for the benefit of the lessor of the plaintiff, unless this lease is proved. It is therefore too much to drive us to the apices juris, to see if the proof by the attesting witness or by

another person is sufficient. There is no reason, therefore, why this attorney should not be compelled to make this affidavit. The rule must be absolute as to both the facts; for, a reasonable and fair application having been made, and a peremptory and studied refusal given, the attorney must in consequence pay the costs of this rule.

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Rule absolute.

DOE d. ALLANSON v. CANFIELD and Wife.

RYLAND applied for an attachment against the two defendants in the present case, for non-payment of costs pursuant to the Master's allocatur. Several attempts had been made to serve both husband and wife, but the former had managed to keep out of the way, so as to avoid service. Personal service had, however, been effected on the wife. The question was, how the rule in the present case should be moulded.

Although husband and wife may be parties to a suit, an attachment for non-payment of costs will not be granted against the latter.

WILLIAMS, J.—It appears to me that, although the wife is a party to the record, I should be carrying the rule further than any precedent warrants, if I were to grant an attachment against the wife. A rule nisi may be taken as against the husband.

Rule accordingly.

HIND and CLARK v. KINGSTON.

CHANNELL applied for leave to enter up judgment on an old warrant of attorney. The two plaintiffs, Hind and Clark, were trustees of the defendant's wife, and on the celebration of the marriage, Kingston, the defendant, gave a warrant of attorney to secure a certain sum of money to the trustees for the benefit of his wife in case of

Where a warrant of attorney is executed to two persons, and one dies, the survivor may enter up judgment in his own name.

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his death, bankruptcy, or insolvency. After the warrant of attorney had been executed, Hind died, and now, that it became necessary to enforce it, a question arose whether judgment in the name of the survivor could be entered up. The case of *Build and Another v. Wightman* (a), was an authority in support of the present application. There, the warrant had been given to the two plaintiffs and another person since deceased to secure a joint debt to all three as partners. Nothing was said of "survivors" either in the warrant or the defeasance, but *Parke, J.*, allowed judgment to be entered up. The case of *Johnson v. Jenkins* (b) was to the same effect (c).

WILLIAMS, J., granted the rule.

Rule granted.

(a) Ante, Vol. 1, p. 545.

(b) Ante, Vol. 1, p. 367.

(c) See *Fendall and Others v. May*, 2 M. & S. 76; *Gee v. Lane*, 15 East, 592; *Todd v. Todd*,

Barnes, 48; S. C., by the name of *Todd v. Dodd*, 1 Wils. 312; *Fulcher v. Smith*, 2 Sir W. Bl. 1301.

FOSTER v. CLAGGET.

The Court will not allow judgment to be entered up on a warrant of attorney at the instance of an executor, where the testator only has been mentioned in the warrant, although it is stated in the defeasance that the "executors and administrators" might enter up judgment in the event of a certain sum not being paid.

WARREN moved, on the part of the executor of Foster, for leave to enter up judgment on an old warrant of attorney. The warrant had been given to the testator, and was directed to him only, without mentioning his "executors and administrators." In the defeasance, however, it was stated that the warrant had been given to secure to Foster the payment of a certain sum, and directed that if that sum was not paid on or before a certain day, it should be lawful for Foster, his "executors and administrators," to enter up judgment and sue out execution; and if twelve months should elapse after the signing judgment and before suing out execution, that it should be unnecessary for Foster, his "executors or administra-

tors," to move the Court to have execution. *Warren* contended, that although the warrant of attorney itself gave power to Foster only, to enter up judgment, yet, taking the whole instrument together, the parties clearly intended that Foster's executors should have power to enter up judgment. The case of *Hyde v. Skinner* (a), was an authority to shew that every person's executors must be implied in himself, and consequently, as power was given to the testator to sign judgment, a similar power might be exercised by his executors. The cases of *Manvill v. Manvill* (b), and *Henshall (Executrix) v. Matthew* (c), were against the application; but the cases of *Fendall v. May* (d), *Heath v. Brindley* (e), and *Hiscocks v. Kemp* (f), were decided on a principle favourable to the present application. Nothing but positive authority or technical objection could be considered as opposed to granting the rule.

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WILLIAMS, J.—Undoubtedly, it will sometimes happen that the executors of a party are entitled to the benefit of a contract into which a party has entered, although they are not expressly named. But the question here is, whether I can treat the warrant of attorney, which has been given to the testator only, in the light of such a contract. I think I cannot. In the case of *Henshall (Executrix) v. Matthew*, which was a decision of the full Court of Common Pleas, it was decided that "an authority of this nature must be strictly pursued, and we cannot supply any supposed omission of the parties." I think, therefore, on this principle, whatever the parties may have intended in the present instance, it is imperative on me to refuse the application.

Rule refused.

(a) 2 P. Wms. 196.

(b) Ante, Vol. 1, p. 544.

(c) *Ib.*, p. 217.

(d) 2 M. & S. 76.

(e) 4 N. & M. 235.

(f) 5 N. & M. 113.

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Ex parte MARSHAL.

Where a person was admitted as an attorney, but never took out his certificate, or practised for a period of 24 years from the time of his admission, the Court permitted him to take out his certificate without the form of re-admission.

BAZETT made an application on the part of Mr. Marshal, the object of which was to ascertain from the Court, whether the usual notices for readmission as an attorney need be given by the applicant. It appeared from the affidavit on which the application was founded, that Mr. Marshal having served the usual time, and complied with the usual forms, was admitted, as an attorney of the Court, in Michaelmas Term, 1814. He did not however take out his certificate either then or since; and had not practised on his own account at all. He entered into the service of an attorney in the year 1817, and continued so engaged, until the month of February last, when his master died. The question now was, whether under the circumstances the applicant need be re-admitted, or might at once take out his certificate.

WILLIAMS, J., thought that, under the circumstances, he need not be re-admitted, and might at once take out his certificate.

Application granted.

See Curdiffe v. Maltass 6 B.L. 723. 7 C.B. 695

JONES v. COLLINS.**WRIGHT v. COLLINS.**

Where an affidavit of debt states the defendant to be indebted in 304*l.* 4*s.* 7*d.*,

"principal and interest," by virtue of an indenture covenanting to pay 300*l.*, the amount of principal and interest is sufficiently distinguished.

Stating a sum due "upon and for the balance of accounts between the defendant and the plaintiff," is insufficient in an affidavit of debt.

In an action on a bill of exchange by an indorsee against an indorser, the affidavit of debt must state the default of the acceptor, a statement that the amount "is now due and unpaid," will not supply the omission of that allegation.

An affidavit of debt, stating two causes of action, one imperfectly, and the other correctly, is not bad altogether, but the defendant may be held to bail for the latter if separate and independent of the former.

in these two actions respectively. The ground of the application in both cases was an alleged defect in the affidavit of debt. The affidavit in the first action was as follows: that "George Collins, of &c., is justly and truly indebted unto the said company, called the Herefordshire Banking Company, in the sum of 304*l.* 4*s.* 7*d.*, for principal and interest money due and owing to the said company, by virtue of a certain indenture bearing date the 9th of December, 1837, and made between the said George Collins, of the first part, deponent, of the second part, and Francis Woodhouse, gent., of the third part, whereby the said George Collins covenanted with deponent to pay to him for the use of the said company, on demand, the sum of 300*l.*; and in the further sum of 57*l.* 1*s.* 9*d.*, for money due from the said George Collins to the said company, upon and for the balance of account between the said George Collins and the said company." The first objection to this affidavit was, that it did not distinguish how much of the 304*l.* 4*s.* 7*d.* was due for principal, and how much for interest. That however was not material, and if it was, it was sufficiently shewn by setting out the indenture, that 300*l.* was due for principal. Secondly, it was objected, that the statement of the account, as agreed upon between the parties, was not sufficiently set forth by the words, "upon and for the balance of account between the said George Collins and the said company." The case of *Balmano v. May* (a) was an authority in support of the present form of affidavit. The case of *Debenham v. Chambers* (b) was to the same effect. The case of *Campbell v. Tyler* (c) supported the same view. With respect to the case of *Hooper v. Vestris* (d), it was expressly overruled by *Balmano v. May*. Thirdly, it was objected, that if the affidavit was bad on either of these grounds, it was bad altogether. It was true

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(a) Ante, p. 306.

(b) Ib. p. 101.

(c) Ante, Vol. 5, p. 632.

(d) Ib. p. 710.

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that in the cases of *Raggett v. Guy* (a), and *Drake and Others v. Harding* (b), the Court had decided that if an affidavit was bad in part, it was bad in the whole. But in the case of *Prior v. Lucas*, which was mentioned in a note to the report of *Drake v. Harding*, in 1 Har. & Wol. p. 365, *Littledale, J.*, expressed an opinion opposed to the cases of *Baker v. Wells* (c), and *Kirk v. Almond* (d). So far therefore, as far as the affidavit in the first action was concerned, it was submitted that it was sufficient.

The affidavit in the second cause of action was in the following words:—"That George Collins, of &c. is justly and truly indebted to deponent in the sum of 37*l.* 19*s.*, for balance of principal money on a bill of exchange for 160*l.* 19*s.*, drawn by defendant upon, and accepted by John Collins, payable at a day now past to defendant, or his order, and indorsed by the said George Collins, and which said balance of 37*l.* 19*s.* on the said bill of exchange is now due and unpaid to deponent; and also in the sum of 189*l.* 13*s.* 8*d.*, for principal money on a promissory note, bearing date &c." The objection to this affidavit was, first, that it did not appear that the plaintiff, who was both drawer and payee, indorsed the bill; nor how the defendant, who, it appeared, was a subsequent indorser, could be liable to the plaintiff. This, it was submitted, was sufficient in an affidavit of debt, as it was not necessary in such a case strictly to shew the plaintiff's title. *Bradshaw v. Saddington* (c) was an authority to that effect. Secondly, it was objected, that no default of the acceptor was shewn. But the words "now due and unpaid" stated the default with sufficient particularity. In both cases it was, therefore, contended that the affidavit was sufficient, and consequently, that the rule in both cases ought to be discharged.

(a) Ante, Vol. 3, p. 554.

(b) Ante, Vol. 4, p. 34.

(c) Ante, Vol. 1, p. 631.

(d) Ante, Vol. 1, p. 318.

(e) 7 East, 94.

Addison, in support of the rules, contended, as to the first point on the former affidavit, that the case of *Latreille v. Hoepner* (a) shewed that the sums due for principal and interest were not sufficiently distinguished. With respect to the second point on the same affidavit, the case of *Eicke v. Evans* (b) was an authority to shew the affidavit to be insufficient. With respect to the third point, that an affidavit bad in part was bad as to the whole, the case of *Counce v. Rigby* (c) must be regarded as an authority in favour of that objection. Then, with regard to the second affidavit; the first objection as to the statement of the plaintiff's title to the bill, the case of *Bishop v. Hayward* (d) clearly shewed it to be fatal. The case of *Bradshaw v. Saddington* had been several times overruled. The second objection was fully supported by the cases of *Buckworth v. Levi* (e), *Crosby v. Clark* (f), *Banting v. Jadis* (g), *Cross v. Morgan* (h), and *Simpson v. Dick* (i).

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Cur. adv. vult.

WILLIAMS, J.—These were two cases which were argued before me, and the application in each was, that the defendant should be discharged on entering a common appearance. The applications were both made on objections to the affidavits to hold to bail, and two questions arose, first, whether the affidavits, being each for two separate and distinct causes of action, were good as to the whole, or good as to part and bad as to part; and, secondly, if they were not good as to the whole, and the two parts could be separated, whether the defendant could be held to bail for that part of the whole amount which was properly

(a) Ante, Vol. 2, p. 758.

(b) 2 Chit. Rep. 15.

(c) 3 Mee. & W. 67.

(d) 4 T. R. 470.

(e) Ante, Vol. 1, p. 211.

(f) Ante, Vol. 5, p. 62.

(g) Ante, Vol. 1, p. 445.

(h) Ib. p. 122.

(i) Ante, Vol. 3, p. 731.

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sworn to in the affidavits. The latter question is one which is continually occurring, and very often arises at chambers, and it is desirable that it should be finally settled.

In the first affidavit, which was made in the action by Jones, objections were taken to both parts of the affidavit. The first part was objected to for stating a sum to be due for principal and interest, without stating how much was due for principal, and how much for interest. That objection was not much insisted on, but there is a direct answer to it by adverting to the terms of the affidavit. It states that the defendant was indebted "in the sum of 304*l.* 4*s.* 7*d.* for principal and interest money due and owing to the said company;" and it further appears on the face of the affidavit, that the principal was originally 300*l.* Now, if it alleges that 304*l.* 4*s.* 7*d.* was due for principal and interest, and then there is an allegation that 300*l.* was originally due for principal, it is the necessary and unavoidable inference that the 300*l.* is still due for principal, and that the remainder, 4*l.* 4*s.* 7*d.*, is due for interest. That is equivalent to a direct allegation that there is 300*l.* due for principal, and 4*l.* 4*s.* 7*d.* for interest. Such is the necessary conclusion to be drawn from the affidavit, and if it is not, I am at a loss to determine what other conclusion can be drawn. The objection, therefore, does not apply to this affidavit.

The second objection to this affidavit on the latter part of it was more relied on, and with more reason and weight. An additional sum was sworn to as due, and in this form, "and in the further sum of 57*l.* 1*s.* 9*d.* for money due from the said G. Collins to the said company, upon and for the balance of account between the said G. Collins and the said company." It was objected that it did not contain an allegation, that it was a stated and settled account on which the defendant could be arrested; and it seems to me to be a good objection. I think that we are

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to consider, not the ordinary meaning of the term as used in common parlance, but whether it implies a direct allegation of a debt due by the defendant to the plaintiff. Consistently with this allegation, the plaintiff may have taken the account entirely by himself. I will assume it was done *bonâ fide*, and that he gave the defendant credit for whatever he thought right, and then, confiding in the accuracy of his own account, he may have come to the conclusion that a certain sum was due, without any assent to it on the part of the defendant. But there is no doubt that an account must be stated between both the parties in order to authorize an arrest. I think, also, that the language of the word "balance" is not material. Suppose the words had been "upon and for an account between the parties," that, it seems to me, would have been an allegation of nearly the same force. We are not, however, driven to that consideration, as Mr. Addison referred to the case of *Polleri v. De Sousa*, and I am not able to distinguish the allegation in that case, of a sum being due "as the balance of accounts," from the allegation in the present "upon and for the balance of accounts." In that case there were other objections, but the report states that it was principally on account of this objection that the affidavit was held to be defective. The meaning of the word "balance" was much considered in the case of *Visger v. Delegal* (a), and the effect of the words "balance of account" was thought to be of little importance, and consequently, did not operate on the mind of the Court. It is, therefore, quite clear on those cases, and also on the reason of the matter, that it ought to be alleged to be either a "stated" or a "settled" account, in order to authorize an arrest. The constant usage, moreover, must not be overlooked. Mr. Tidd's forms give the form in the words "upon the balance of an account stated and settled by and between &c.;" and another similarly use-

(a) Ante, Vol. 1, p. 333.

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ful work gives the same form. I quite agree with Lord *Tenterden* in the case of *Visger v. Delegal*, that it is better to abide by established forms than to embarrass ourselves by a voluntary deviation from them. I think, therefore, that the latter part of that affidavit is defective.

As to the other affidavit in the action by Wright, I think that is in the same situation, the latter part of it being good, and the former part bad. The former part is in confusion as to how the plaintiff derived his interest in the bill; but be that as it may, the allegation is, that there is due from the defendant the sum of 37*l.* 19*s.* for balance of principal money on a bill of exchange for 160*l.* 19*s.*, drawn by deponent upon, and accepted by "John Collins, payable at a day now past to deponent or his order, and indorsed by the said George Collins, and which said balance of 37*l.* 19*s.* on the said bill of exchange is now due and unpaid to deponent." It is clear therefore that there is an oath made of a debt due from the defendant as an indorser, and there is no allegation of any default on the part of the acceptor. That objection has been under consideration in several cases, and it has been held, beyond all doubt, to be necessary when an affidavit of debt charges the drawer or indorser of a bill of exchange that it must state a default on the part of the acceptor. That is recognized as the undoubted practice in the case of *Caunce v. Rigby*, which was referred to in the argument for another purpose. In several earlier cases in the Court of Exchequer, the Court, after much consideration, was of opinion that it was indispensable there should be such an allegation of default on the part of the acceptor. That, therefore, being the plain rule, on the present occasion I think the affidavit is clearly defective. As to the other part of the affidavit no objection is made, and consequently, this second affidavit is on the same footing as the first.

Next comes the question, on which there has been a variation in the decisions, whether when there are two distinct and separate causes of action stated in an affi-

davit of debt, one of which is bad and the other good, the arrest being for the joint amount, the affidavit is bad altogether. It has been held undoubtedly to be bad altogether, and that opinion has been for a long time acted upon. In *Kirk v. Almond*, it was held, that an affidavit which was good in part and bad in part was bad altogether, and the defendant was discharged out of custody. That case was acted on for some time; as in the case of *Drake v. Harding* by my Brother *Coleridge*. But since that time there has been a variation in the opinions of the Judges, which it is unnecessary now to trace. In the case of *Prior v. Lucas*, which is in a note to the report of the case of *Drake v. Harding*, and which was before my Brother *Littledale* at chambers, the report states that the cases in the Court of Exchequer of *Baker v. Wills* and *Kirk v. Almond*, were referred to, and that my Brother *Littledale* did not agree with those decisions, and that he had consulted with the other Judges on the subject. I have seen my Brother *Littledale*, and he says that the report of that case is correct, and that he did on that occasion consult the other Judges, and the result is, that the cases of *Drake v. Harding* and *Kirk v. Almond* are no longer to be considered as good law. The case of *Prior v. Lucas*, establishing this rule, that where the total amount sworn to is not mixed up with what is partly good and partly bad, but where distinct and separate causes of action in separate amounts are sworn to, one of which is properly, and the other improperly sworn to, the affidavit is good as to that amount, in respect of which it is correct, and that the Court will not discharge the defendant altogether for such an objection. On the present occasion therefore, the rules must be discharged, and the defendant must give bail for the two amounts which are rightly sworn to on the affidavits, that is, in the one case for the 304*l.* 4*s.* 7*d.*, and in the other for the 189*l.* 13*s.* 8*d.*

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Rule discharged, accordingly.

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Ex parte the Auditors of the Parish of ST. PANCRAS.

The Quarter Sessions having allowed certain trustees' accounts, which it was suggested had not been audited by the parish auditors under the general vestry act, pursuant to the provisions of that statute, a prospective prohibition to the Quarter Sessions, forbidding them to allow future accounts under similar circumstances, was refused.

THE Attorney-General (with whom was *Hoggins*) moved for a rule to shew cause why a writ of prohibition should not issue, directed to the Justices of Middlesex, forbidding them to proceed to audit the accounts of the trustees for building a new church in the parish of St. Pancras under the authority of certain local acts, previous to the said accounts being submitted to the inspection of the auditors appointed under the general Vestry Act, the 1 & 2 Will. 4, c. 60. The present application was made on behalf of those auditors. For some reason, which was quite unknown to those gentlemen, the trustees had refused to submit their accounts to the auditors according to the provisions of sect. 34 of the general Vestry Act. Two several writs of mandamus were obtained from the Court of Queen's Bench, commanding the trustees to produce their accounts. Those writs were, however, on the ground of certain informalities, quashed. A new course was then adopted on the part of the trustees, in order to frustrate the intention of the Court. They presented their accounts for the half-year ending on Lady-day, at the Easter Quarter Sessions. That Court, being of opinion that the fact of the accounts not having been previously audited pursuant to the provisions of the Vestry Act did not prevent the allowance of them, did allow them. This decision was final. As a mandamus could only be moved for in term, this proceeding on the part of the trustees completely prevented the auditors from enforcing the production of the accounts. The presumption was, that a similar course would be adopted with respect to the next half-year's accounts. Thus, although the act of parliament required the production of the accounts, and the Court of Queen's Bench had intimated an opinion in accordance with that act, both the one and the other were rendered nugatory by the proceedings of the trus-

tees. A difficulty certainly presented itself in making this application, because it must proceed on a presumption that the Court of Quarter Sessions would on a future occasion disregard the provisions of the act of parliament; and, moreover, the writ must be prospective.

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WILLIAMS, J.—If the Quarter Sessions entertain a motion for allowing the trustees' accounts, surely that court, if there is any doubt as to whether they ought to be previously examined before the parish auditors, will listen to a preliminary objection, to the allowance of the accounts. If there is any doubt upon the point, they will probably grant a case for the opinion of this court, as to whether the accounts ought to be so allowed. However, the difficulty which is suggested cannot, I think, be surmounted. The cases in which a writ of prohibition is granted, are where an inferior court is proceeding in a civil, instead of an ecclesiastical matter, or where it is proceeding according to some form not allowed by the common law. I am not aware of any case, in which a prohibition has been granted to prevent a court from adopting a course of proceeding, on the presumption that it would follow a course not allowed by law.

Rule refused.

COURT OF EXCHEQUER.

Easter Term,

IN THE FIRST YEAR OF THE REIGN OF VICTORIA.

SAMUEL *v.* Sir J. DUKE, JOHNSON, and FORD.

The delivery of a writ of *fi. fa.* to the sheriff only binds the goods of the defendant, so as to enable the execution creditor to pursue his claim; but, subject to that, the defendant may deal with the goods as he pleases, and if he dispose of them in market overt, the right of the sheriff ceases altogether.

In trover against a sheriff, who has levied under a writ of *fi. fa.*, if the act of conversion relied on is the seizure of the goods, the sheriff must plead specially a justification under the writ; but if the act of conversion be the *sale* of the goods, it seems he may give his defence in evidence, under a plea denying the plaintiff's right of possession.

THIS was an action of trover. The defendants pleaded, first, not guilty; secondly, that the plaintiff was not possessed of the goods and chattels in the declaration mentioned.

At the trial before Lord *Abinger*, C. B., it appeared that the defendant Ford, in the month of September, 1836, had lent to a Mr. Browning the sum of 700*l.*, to be repaid in three months, taking as a security a warrant of attorney. The money not having been paid, Ford entered up judgment, and on the 10th of December, 1836, delivered to the sheriff a writ of *fieri facias*, with instruction to levy on the goods of Browning at his chambers, in Lincoln's-Inn Fields. No admittance could be gained to the chambers; and on the 19th of December, Ford went with the officer to Browning's residence in Park Lane, in order to levy on his goods there. Browning was not at home, but his sister, who appeared, claimed the goods and furniture in the house as her own by purchase from her brother; the officer ultimately withdrew upon Miss Browning offering her security for her brother's debt. On the 2nd of January, 1837, Browning was arrested at the suit of another creditor, and went to prison. At that time, Ford was sent for by Browning and his sister, when it was agreed that Ford should make a further advance to Browning to satisfy the debt for which he was then in custody, upon the security of his furniture in Lincoln's-Inn Fields, if, upon valua-

tion, it should be worth the sum required. Browning delivered the key of the chambers to Ford, who had the goods valued, when it appeared that they were not a sufficient security, and Ford returned the key to Browning after keeping it a fortnight. On the 5th of January, 1837, Miss Browning executed a warrant of attorney to Ford for collaterally securing the sum of 700*l.* and interest due from her brother, the said sum to be paid by instalments. Browning swore that, upon the execution of the warrant of attorney by his sister, Ford had said Browning's goods were released. The first instalment upon the warrant of attorney was paid, but not the interest. Upon the 15th of April, 1837, Browning, being desirous of raising some money upon the security of his furniture in Lincoln's-Inn Fields, applied to the plaintiff for that purpose, who advanced him 500*l.*, and received a bill of sale of the furniture and effects, and possession of them was then delivered to him. In May, 1837, another execution was levied upon the goods of Browning at his chambers; but on the production of the bill of sale by the plaintiff, the execution creditor withdrew, when, upon search in the sheriff's office, the writ lodged by Ford was discovered, under which the sheriff, after receiving an indemnity, sold for the sum of 485*l.* 19*s.* The jury found that the transaction between Browning and the plaintiff was *bonâ fide*. It was objected on the part of the defendant, that the plaintiff could not recover, inasmuch as the goods were bound from the time Ford's writ was delivered to the sheriff, and that no valid purchase could afterwards be made. The jury found a verdict for the plaintiff, and the learned Judge reserved leave to move to enter a nonsuit, if the Court should be of opinion that there was not sufficient evidence to warrant the jury in finding that Ford had abandoned his execution.

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Platt having obtained a rule nisi accordingly,

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Kelly and Richards shewed cause.—There was abundant evidence of Ford having abandoned his execution after he received the warrant of attorney from Miss Browning. One difficulty is removed by the jury having found that the transaction between the plaintiff and Browning was *bonâ fide*, and not for the purpose of preventing Ford's execution. It shews at least that Browning believed Ford to have abandoned all claim to the goods. If that had not been the understanding between the parties, Ford might have seized, when he had possession of the key of the chambers, and caused a valuation to be made of the goods. The receipt of the first instalment on the warrant of attorney executed by Miss Browning also furnishes strong evidence of an abandonment. Besides, there is nothing whatever to impugn Browning's statement, that Ford had said the goods were released. The writ delivered at the sheriff's office was returnable immediately, but nothing was done by virtue of it until May, 1837, it having lain during that time in the office; Ford took no steps to enforce execution until after the goods had been seized at the suit of another party. After the lapse of so much time before the writ was acted upon, the mere fact of its remaining in the sheriff's office gives it no more weight than if it had been returned to the custody of the party who issued it. [Lord *Abinger*, C. B.—The argument on the other side is, that, assuming there was evidence to go to the jury of an abandonment, yet, in point of law, the goods were bound from the time of the delivery of the writ to the sheriff.] That may be so when there is no laches on the part of the execution creditor, but here, abundant opportunity was afforded of enforcing the execution. The mere delivery of the writ to the sheriff has no effect in changing the property, and if the creditor omits to take measures to compel the execution of the writ, he will lose his priority, and the sheriff will be

bound to seize the goods, if another fieri facias is subsequently delivered to him: *Payne v. Drew* (a).

But secondly, the defendants cannot set up this defence upon these pleadings. Since the new rules the plea of "not possessed" puts in issue the property only, and the plea of "not guilty" the act of conversion only. Browning was at first indisputably owner of the goods, and he assigns them to the plaintiff for a good consideration, and delivers him possession. [*Parke, B.*—In order to support trover, the plaintiff must have a possessory right: it is said that he has not that, as Browning could not make a valid assignment to him.] The assignment would be good as against Browning and the sheriff. [*Alderson, B.*—Is not *Owen v. Knight* (b) against you? There, the plaintiff delivered a lease to a third party for the purpose of raising money upon it: the defendant, who had advanced the money, and which was not repaid, refused to deliver up the lease, and the plaintiff sued him in trover; the Court held that this defence might be given in evidence under a plea that the plaintiff was not possessed of the deed as his own property.] That case is distinguishable, since there, at the time of the conversion, the property was in the possession of the defendant with the plaintiff's assent, but here, the plaintiff had possession up to the very time of seizure.

Platt and J. Bayley contra.—The assignment to the plaintiff was absolutely void, the goods having been bound by the delivery of the writ to the sheriff on the 10th of December. It may be conceded, that the mere delivery of the writ does not change the property, but the effect is to render the goods incapable of transfer from that time. Formerly, the goods were bound from the teste of the writ, but now, by the 16th section of the Statute of Frauds, they are bound only from the time of its delivery to the

(a) 4 East, 523; 1 Smith, 170.

(b) 4 Bing. N. C. 54.

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sheriff: Tidd's Practice, 1000, Com. Dig. tit. execution, D. 2. Here, Ford claims against an alienation, and not against process: *Bennett v. Apperley* (a). The evidence of the abandonment rested wholly with Browning.

Secondly, The case of *Owen v. Knight* is an authority that this defence may be set up upon these pleadings. Before the new rules of pleading, the defendant might shew, under the plea of not guilty, that both the right of property and possession were in himself; but now, under "not guilty" the fact of conversion only is in dispute, and both the possession and the property are in issue under the second plea. [*Parke, B.*—The plaintiff says, the goods are mine by assignment, and you have converted them: then, assuming that the property passed to the plaintiff, what answer have you?] The defence goes to shew that the plaintiff in fact never had any property in the goods.

LORD ABINGER, C. B.—I am of opinion that the rule for a nonsuit ought to be discharged, and that there was sufficient evidence to go to the jury, that Ford had abandoned his writ of execution. It appears that after he had made an unsuccessful attempt to levy on the goods, at Browning's chambers, he had taken from Miss Browning a warrant of attorney as a security for the debt. Now, if he had once abandoned the writ, his right upon it would not revive, although she did not comply with the terms of her engagement. It was also proved that Ford, upon receiving this new security, stated that the goods of Browning were released by this arrangement with the sister. Ford receives the first instalment of his debt in April. The fact, also, of Ford having had possession of the key of Browning's chambers for a fortnight or three weeks after the sister had promised her security, during which

(a) 6 B. & C. 630.

time Ford made no claim to the goods, was a strong circumstance from which the jury might infer an abandonment. It appeared, too, that the sheriff when called upon would not act upon Ford's writ without a bond of indemnity. With regard to the sheriff, it is now too late to make any distinction between him and Ford, as none was made at the trial, therefore, I think the verdict ought to stand. The question of abandonment was one of fact, and the jury were perfectly justified in finding that it had taken place. With regard to the bona fides of the sale to the plaintiff, I left that question to the jury, certainly without any particular intimation to them as to the conclusion they ought to come to on the subject.

Upon the other point, I take it to be quite clear that the property in the goods is not changed by the delivery of the writ to the sheriff, it is still in the debtor, and may be dealt with by him, subject to the claims upon it: it is merely bound from that time, so as to enable the execution creditor to pursue it with all his rights, unless under special circumstances. The case of *Payne v. Drew* is an authority to shew that the property is not changed until the sale by the sheriff. I believe it has been held so frequently; and I think it is quite evident that Browning had a right to assign his property subject to all the obligations which attached upon it as regarded any other person, and that therefore the property passed to the plaintiff, notwithstanding the delivery of the writ to the sheriff. Mr. *Platt* contended at the trial that the effect of the statute of frauds was to make the property itself unchangeable, except upon sale in market overt. I did not concur in that view of the matter, but reserved the point for him. Upon the whole, therefore, I am of opinion that the rule must be discharged.

PARKE, B.—I am of the same opinion, and think the rule ought to be discharged upon the point reserved at

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the trial, namely ; whether there was evidence to go to the jury that Ford had abandoned his writ of execution. The jury having found that the transfer of property to the plaintiff was bonâ fide, one difficulty is removed, but then the defendants contended that the transfer was not good in law, as it took place after the delivery of the writ to the sheriff. Now it is perfectly clear to me, both upon the decided cases and the reason of the thing, that after a writ of execution has been delivered to the sheriff, the defendant may convey his property, but that the sheriff has a right to the execution notwithstanding the transfer. By virtue of the statute of frauds, the right which was given to the sheriff by the writ to seize the property, no longer speaks from the teste of the writ, but from the time of its delivery, upon the receipt of which, the sheriff is to levy. But, subject to the execution, the debtor has a right to deal with his property as he pleases, and if he transfers it in market overt, the right of the sheriff ceases altogether. It appears, then, that the property passed to the plaintiff by a bonâ fide transfer. But it was contended by Mr. *Platt*, that, as the delivery of the writ to the sheriff was upon the 10th of December, 1836, and prior in point of time to this transfer, the sheriff had a right to go on and levy, but the answer was, that Ford, at whose suit the execution issued, agreed to abandon it. Upon that point, my Lord expressed his opinion; and if there was evidence of abandonment to go to the jury, Mr. *Platt* was to take no benefit by his motion, unless the court should be of opinion that in point of law, the goods were bound by the delivery of the writ, and no transfer could be made. By that reservation we are bound; and I think there was quite sufficient evidence to go to the jury that Ford had agreed to abandon that writ. If, then, after that, these goods were seized by Ford, would he be liable to an action by Browning or by any purchaser from him? It seems to me that, under such

circumstances, Ford would be clearly liable in an action of trespass, for the seizure of the goods and subsequent sale of them; but, had a distinction been made at the trial between him and the sheriff, I should have doubted whether the sheriff could have been made responsible in this case, upon different pleadings. The sheriff is to look to the writ only, and he would be justified under it in seizing all that were Browning's goods at the time of its delivery to him, unless he had received a countermand from Ford himself. The sheriff is not concluded by receiving an indemnity from Ford. I think there was hardly sufficient evidence of any such countermand; but it seems to me that the sheriff is not now in a condition to ask for a verdict in his favour, as no distinction between the parties was made at the trial. I take it to be perfectly clear that the property passed to the plaintiff, and that the sheriff was justified in the seizure of that property, unless the plaintiff was in a condition to shew that, at the time of the conversion, he had the lawful possessory right of the property. If the conversion had been the sale of the goods, why then the sheriff must have previously seized; and probably it would have been competent for him, under the denial of the plaintiff's right of possession, to shew, that at that time, the plaintiff had no possessory right. But the case is different, if the conversion complained of is the act of seizure. I feel a strong opinion, that under these pleadings it would not have been competent to the sheriff to enter into his defence at all. I think, therefore, that the rule that has been obtained for a nonsuit or a new trial must be discharged.

BOLLAND, B.—I am of the same opinion; and also think, that the argument to-day has gone much further than the rule that was granted warranted, as the sole ground upon which it was moved was, that the delivery of the writ to the sheriff had bound the goods.

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ALDERSON, B.—It was moved on the ground that the goods were bound by the delivery of the writ, and that Browning had no power to sell them except in market overt. It therefore appears to me that this case has been discussed at unnecessary length. I quite agree with the view taken by my Brother *Parke* upon the pleadings, and that, in order to avail himself of them, the sheriff should have pleaded the circumstances specially.

Rule discharged.

MORTIMER v. PREEDY.

A writ of trial, directed to the Sheriff's Court of London, was returnable on the 19th January, 1838. A court was holden on the 18th, and adjourned to the 20th, on which day the cause was tried.

Semble, that the Court had no jurisdiction to try the cause.

Quære, as to whether an action for use and occupation, by the assignee of the reversion against lessee, is local.

DEBT upon a parol demise for use and occupation of certain premises by the assignee of the reversion against the lessee. The defendant pleaded, first, *nunquam indebted*; and, secondly, that the tenancy was determined by act and operation of law before the plaintiff had any interest in the premises, and before any rent was due to him.

The cause was sent for trial to the Sheriff's Court in the city of London, and the writ of trial was returnable on the 19th January. The court day was on the 18th, when the cause stood on the list for trial, but the Court being unable to get through the list, adjourned until the 20th. On the 20th it was tried before *Arabin*, Serjt., when it appeared that the plaintiff claimed 6*l.* 5*s.* for one quarter's rent due at Michaelmas, 1837. The premises were assigned to the plaintiff during the quarter for which the rent was sought to be recovered. It was objected on the part of the defendant, first, that as the writ of trial was returnable on the 19th of January, the learned Serjeant had no jurisdiction to try the cause; and secondly, that this was a local action, and could only be tried in the county of Middlesex, in which the premises were situated. The objections were overruled, and the plaintiff obtained a

verdict for the sum claimed, the defendant having liberty to move on the above points.

Mansel having obtained a rule to shew cause why a venire de novo should not be awarded into the proper county,

Gurney shewed cause.—The Court having sat on the 20th by adjournment, the cause must be considered as in fact tried on the 18th. In *Sherman v. Pinsley* (a), the objection appeared upon the record, but the Court said that as the defendant had appeared at the trial, they could not say that there was no jurisdiction, and they added, that if it were necessary they would amend the record. Here, it appears by the record that the proceedings are correct, as the trial is stated to have taken place on the 18th, which was before the writ was returnable. The same rule governs this case as is applicable to the sittings, which are in contemplation of law but one day. So, with respect to the assizes, the death of the defendant between the commission day and day of trial, is not a ground for setting aside a verdict in favour of the plaintiff: *Jacobs v. Miniconi* (b), *Anonymous case* (c), *Taylor v. Harris* (d). It is the same as if the Court had commenced trying the cause on the 18th, and being unable, for want of time, to finish, it had unavoidably stood over until the 19th.

Then, as to the second point, it is said that this action is local, and *Bond v. Cudmore* (e) is relied upon by the other side. That, however, was the old action of debt which depended upon the privity of estate. There, the plaintiff set out the demise and accruer of title to himself, and described the locality of the premises, the right of action

(a) 3 Hodges, 32.

(b) 7 T. R. 31.

(c) 1 Salk. 8.

(d) 3 B. & P. 549.

(e) Cro. Car. 183.

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accruing only from the possession of the land. But, assuming the action to be local, this objection is aided, after verdict, by the 16 & 17 Car. 2, c. 8: *Mayor of London v. Cole* (a). Until the 11 Geo. 2, c. 19, s. 14, passed, the old action of debt was the only remedy of the assignee of the reversion when the demise was, as here, by parol. That statute gave the action for use and occupation, and it is maintainable by the assignee without attornment: *Lumley v. Hodgson* (b). In debt for use and occupation it is not necessary to state the situation of the premises. *King v. Fraser* (c), *Kirtland v. Pounsett* (d). [Parke, B.—*Lumley v. Hodgson* was for rent in the time of the reversioner. Here you are not merely seeking to recover bygone rent.] No objection was made at the trial that the plaintiff claimed too much. [Alderson, B.—Should it not have been pleaded that the premises were in another county?]

Mansel, in support of the rule.—The Judge of the Sheriff's Court could have no jurisdiction to try the cause, except what is given by the 3 & 4 Will. 4, c. 42, s. 17, and which is expressly defined by that statute. The case is analogous to writs of mesne process or execution, where nothing can be done upon the writ, after it is returnable. The defect is not cured by the entry on the record, as the Judge had no power to make the proceedings nunc pro tunc. This is distinguishable from the case put of the death of the defendant between the commission day and the day of trial, because the assizes are only one day; but here, the authority to try the case is circumscribed by the writ of trial; after the writ was returnable, all power to try the cause was at an end. The proper course was to reseal the writ. A witness could not be indicted for perjury where a trial took place under these circumstances.

(a) 7 T. R. 583.

(b) 16 East, 99.

(c) 6 East, 348; 2 Smith, 462.

(d) 1 Taunt. 570.

PARKE, B.—There is considerable difficulty upon the first point ; and I think the defendant had better pay the money, and the parties agree to a stet processus. If the cause is not tried before the writ is returnable, the proper course is to apply to a Judge to extend the time for the return of the writ. There may be also some difficulty as to the plaintiff's right to recover the whole amount ; he is seeking to recover not only a compensation for the use and occupation of the premises during the time that he was assignee, but also for some part of the time they were in the possession of the reversioner.

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ALDERSON, B.—The parties had better consent to this arrangement, as there are difficulties about the trial taking place after the writ was returnable.

Rule discharged on the above terms.

DIGNAM v. MOSTYN.

THIS was an action to recover an attorney's bill of costs, amounting to 7*l.* 6*s.* On the 11th of November, the defendant having applied for further time to plead, an order was made for four days' further time, upon the terms of his "pleading issuably, rejoining gratis, and taking short notice of trial, if necessary, whether tried before the sheriff or not." On the 3rd of January full notice of trial before the sheriff of Middlesex was given for the 11th. That notice and the issue were returned by the defendant the following day on account of some irregularity. Another notice was given on the 5th for the 16th, which the defendant again returned as irregular. On the 16th, the cause was struck out of the paper, the plaintiff not being prepared to try it. A third notice was given on the 17th for the 25th, and the action was then tried as an unde-

The rule which requires a plaintiff, having permission to give short notice of trial for a particular sittings, to try at those sittings, or give full notice, applies equally to the case of a trial before the sheriff.

The retaining an irregular notice of trial, is not a waiver of the irregularity.

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fended cause, and a verdict found for the plaintiff. *W. H. Watson* had obtained a rule nisi to set aside the verdict on an affidavit, that the defendant lived more than forty miles from town, and therefore was entitled to fourteen days' notice instead of eight. It appeared that the sheriff sat twice a week for the purpose of trying causes.

C. Jones shewed cause, and contended that the defendant was deprived by the Judge's order of insisting upon a longer notice of trial. If the plaintiff had been compelled to give fourteen days' notice of trial, he must, in consequence of the four days allowed for pleading, have been thrown over one sitting of the under-sheriff. Besides, if there was any irregularity, it was waived by the defendant not returning the subsequent notice of trial.

LORD ABINGER, C. B.—If you have permission to give short notice of trial at the sittings after term, you must try at those sittings or give long notice. The same rule applies to a trial before the sheriff.

PARKE, B.—There is no difficulty in the construction of the words "if necessary," where the trial is to take place at the sittings in or after term, when a particular day is appointed. If that day occurs so soon after issue joined as not to leave an interval of fourteen days, then short notice of trial becomes necessary. But the case presents some difficulty when the trial takes place before the sheriff, who sits twice in the week. I agree, however, with my Lord, that if the plaintiff neglects to try at the next practicable sittings, he loses the benefit of the order, and must give a regular notice. With respect to the alleged waiver by keeping the notice, there is no authority to that effect; the returning it would be a mere act of courtesy, and no consequence results from not doing so.

Rule absolute.

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WEBB v. FAIRMANER.

THIS was an action for goods sold and delivered. At the trial before Gurney, B., it appeared that the goods were sold to the defendant on the 5th of October, at two months' credit. On the 5th of December the present action was commenced. It was objected on the part of the defendant that the action was commenced before the credit had expired. The learned Judge reserved the point, and the plaintiff obtained a verdict.

In computing the time of credit on a mercantile contract, the day on which the contract was made is to be excluded from the reckoning.

Richards having obtained a rule to set aside the verdict,

Platt and *Mansel* shewed cause.—In computing the time of credit, the day of sale must be reckoned as one of the days, and as payment might be insisted upon on the first moment of the 5th of December, the cause of action was complete on that day. The rule is, that if the computation is to be made from a particular *day*, that day is to be excluded; but if from a particular *fact*, the day on which the fact occurred is included. In *Clayton's* case (a) a lease for three years from henceforth (that is, from the delivery) was held to mean inclusively of the day on which the delivery was made. So, in *The King v. Adderley* (b), the question was as to the liability of the sheriff to return a writ after the expiration of his office; and it was held, that the day on which he left office was to be reckoned as part of the six months, within which, he was liable to make the return. Under the 21 Jac. 1, c. 19, s. 2, which enacts, that a trader lying in prison two months after an arrest for debt, shall be adjudged a bankrupt, it has been held that the day of arrest is to be included: *Glassington v. Rawlins* (c). So, where the law requires a

(a) 5 Rep. 1.

(b) 2 Doug. 463.

(c) 3 East, 407.

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month's notice of action to be given, the month begins with and includes the day on which the notice was served: *Castle v. Burditt* (a). In *Clarke v. Davey* (b) a distress was made on the 6th of June, and the action was not commenced until the 6th of December, and it was doubted whether it was brought within six calendar months after the act committed, as required by the 8th section of 24 Geo. 2, c. 44. [*Parke, B.*—Suppose goods were sold on the 5th at one day's credit, could you sue on the 6th?] If a man were sentenced to imprisonment for one day he could not be detained there for any portion of the day following. [*Alderson, B.*—There, in favour of liberty, the fraction of a day is included; but, as the law will not in general notice the fraction of a day, the credit must be given either for more or less than a day, and surely the construction should be most strict against the party who is to give the credit. *Bolland, B.*—In the case of a bill of exchange payable at sight you add three days of grace, and cannot sue until the day next following.] No rule can be drawn from the case of negotiable instruments, as they are governed by the custom of merchants.

Richards contra. It is singular that no case is to be found respecting the computation of time in mercantile contracts, except on bills of exchange and promissory notes. So far as that analogy goes it is in favour of the defendant. All the earlier cases are collected and commented upon in *Lester v. Garland* (c), but it is difficult to deduce any correct rule from them. Some of the later cases are directly at variance with those quoted on the other side. Thus, in *The King v. The Justices of Cumberland* (d), it was held that the 13 Geo. 2, c. 18, s. 5, requiring six days' notice to a magistrate of an intention to

(a) 3 T. R. 623.

(b) 4 Moore, 465.

(c) 15 Ves. 248.

(d) 4 N. & M. 378.

apply for a certiorari, was not complied with by a notice given on the 20th to apply on the 25th of the same month. So, in *Pellen v. The Inhabitants of Wanford* (a), it was decided that the two days allowed by the 9 Geo. 1, c. 22, for giving notice of an offence against it, are exclusive of the day on which the offence itself was committed—*Hardy v. Ryle* (b), is at direct variance with *Clarke v. Davey*. In *Watson v. Pears* (c), a patent dated 10th May contained a proviso that a specification should be enrolled within one calendar month next and immediately after the date thereof, the specification was enrolled on the 10th June following, and it was held that the month did not begin to run until the day after the date of the patent.

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PARKE, B.—I think the rule should be made absolute for a new trial. As to whether a lunar or a calendar month was intended, that question is not now open, since at the trial both parties argued the case upon the ground that the credit was given for two calendar months. Then assuming that to be so, I am of opinion that the action is prematurely brought. Whatever doubt may have before existed, the case of *Lester v. Garland* seems to have settled the principle, namely, that the day on which the contract was entered into ought to be excluded. In that case a very elaborate judgment was delivered by Sir W. Grant, and an extremely sound rule laid down, nor are we compelled to break in upon that rule in attempting to reconcile many of the older cases. *The King v. Adderley* appears to have been decided upon the ground that the statute ought to be construed in favour of the sheriff, and *Clarke v. Davey* was decided on the supposed authority of the former case, without adverting to the fact that it was determined in favour of a public officer and not on

(a) 9 B. & C. 134.

(b) Id. 603.

(c) 2 Camp. 294.

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any broad and general principle. Then in *Glassington v. Rawlins* the bankrupt undoubtedly laid in prison for the fraction of a day, and it would be difficult to say that a different construction is to be put upon an imprisonment which becomes an act of bankruptcy and an imprisonment under a sentence. If we look to the cases since *Lester v. Garland*, we shall find they are all authorities for excluding the first day. In *Pellen v. The Inhabitants of Wanford*, Lord Tenterden laid down a very reasonable mode of determining the computation, that is to reduce the whole period to one day. If that is done in the present case, it will be impossible to maintain that the other party had not the whole of the following day to pay the stipulated amount, and if this be true of one day it is equally true of any number of days. Then, if the credit was given for two calendar months, the defendant had the whole of the 5th of December to pay the money. Though I admit that the rule on bills of exchange is not conclusive, because they are regulated by the law of merchants; yet the analogy, as far as it goes, is in favour of that construction.

BOLLAND, B.—The most convenient rule is to exclude the day of sale. The seller, generally speaking, has the whole of that day to deliver the goods, and as they are during that period useless to the purchaser, it is but fair to throw that day out of the calculation of his time of credit. If a party purchases goods on the 1st of January to be paid for by a bill at one month's date, the bill would not be due until the 4th of February, consequently in every case in which the payment is by a bill, the purchaser has the benefit of the day on which the contract was made.

ALDERSON, B.—I think the rule laid down by Lord Tenterden affords a very excellent criterion; that is, to

reduce the time in question to one day, and see if an absurdity follows unless that day is excluded. It will then appear that the day of credit is to be excluded in all cases.

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Rule absolute.

ROBSON v. ROWLAND.

THIS was an action for money had and received. *R. V. Richards* had obtained a rule calling on the plaintiff to state in writing whether this action was brought to recover the deposit paid by him to the defendant, upon the purchase of certain premises, and if so, why the plaintiff should not deliver particulars in writing containing his objections to the title.

In an action to recover the deposit paid upon the purchase of an estate, the defendant is entitled to a particular of the objections to the title arising from matters of fact, but not those which are matters of law.

Jervis shewed cause and objected that the application was too late. The action was commenced on the 1st of December, 1837. On the 6th of February, 1838, a declaration was delivered, to which the defendant had pleaded, and the present rule was moved for on the 20th of April.

R. V. Richards, contra.—An abstract of title has been delivered by the defendant, and all objections made to it removed.

PARKE, B.—On the authority of *Squire v. Tod* (a), and *Collett v. Thompson* (b), the defendant should be furnished with the particulars asked for; and the plaintiff must state all his objections to the title arising from matters of fact, but not those which are matters of law.

Rule absolute.

(a) 1 Camp. 293.

(b) 3 B. & P. 246.

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SPARROW v. JOHNS.

Where it appeared by an attorney's account that he had paid 15*l.* 5*s.* for discontinuance of an action, and he had also done other business for the plaintiff which was not taxable, the Court refused to compel him to deliver a signed bill, he having sworn that he had not made, and did not intend to make any charge in respect of the action.

Quere, whether costs paid by an attorney for his client, on discontinuance of an action, is a taxable item.

PLATT had obtained a rule calling on Mr. Armstrong, the plaintiff's late attorney in this suit, to shew cause why he should not deliver to the plaintiff a true bill subscribed with his own hand and name, of all fees, charges, and disbursements in all matters in which he had been concerned for the plaintiff, and why he should not give credit for all sums received. It appeared that after the above action had been commenced, the plaintiff had discontinued, and that Armstrong had paid 15*l.* 5*s.* as the costs of that discontinuance.

Kelly shewed cause upon an affidavit which stated that Armstrong was the brother-in-law of the plaintiff, and that he had acted throughout the suit for her without fee or reward. He had also done other business for her which did not contain any taxable items. Some family quarrels having arisen, this application was made for the purpose of introducing a taxable item, that the whole account running through several years might be submitted to taxation. [Lord *Abinger*, C. B.—A summons for this purpose was attended before me at chambers, and dismissed, as Armstrong distinctly swore that he never charged any costs in this business or intended so to do.] He admits that he did not insert this item in his account, in order that he might not be compelled to have the whole taxed. If he were to bring action to recover this item, his affidavit, in which he distinctly swears that he never made any charge in respect of it or intended so to do, would be a sufficient answer. It is clear that the statute does not require the delivery of a signed bill where there is no taxable item (a).

Platt and *Hindmarch*, in support of the rule.—The Court will order a bill to be delivered in this case, in pur-

(a) Arch. Prac. Vol. 1, p. 50.

suance of the power which it exercises over its officers. The 3 Jac. 1, c. 7, & 2 Geo. 2, c. 23, are equally imperative in requiring an attorney to deliver a bill of costs, whether twenty or only one taxable item appears in it. [Lord *Abinger*, C. B.—Do you mean to contend that he is bound to deliver an account though he does not mean to charge for any taxable item? *Parke*, B.—The object of the statute was that the client should not have too great a demand made upon him.] A payment of 15*l.* 5*s.* is made in order to settle the action. [*Parke*, B.—That was money paid upon a conditional rule. It is very questionable whether that is a taxable item; it is not money paid in the conduct of the cause.] If it be a payment in the making of which the judgment of the attorney is in any way introduced, it is a taxable item. In *Latham v. Hyde* (a), *Bayley*, B., says: “If an attorney who ought to deliver his bill does not do so he cannot recover for the money out of pocket expended in the course of legal proceedings.” In *Hill v. Humphreys* (b), there was an item for payment of the costs of a discontinuance, and Lord Eldon says, “the question does not arise upon payment of money for the defendant’s use, respecting which the plaintiff was not called upon to exercise his skill and knowledge as an attorney, but it arises upon the payment of certain sums respecting which the plaintiff was called upon, as attorney in a cause, to exercise his judgment and advise his client. [*Alderson*, B.—There Lord *Eldon*’s judgment proceeded upon the ground of there being a taxable item, and that drew all the other items into the bill.] This is evidently money paid for the benefit of the client: *Miller v. Towers* (c). [*Alderson*, B.—So is money paid for conveyancing, yet that is not a taxable item.] In *Crowder v. Shee* (d), money paid by an attorney for costs, which the client was adjudged to pay, was held to be a disbursement within the statute.

(a) 1 C. & M. 128.

(c) Peake, 102.

(b) 2 B. & P. 343.

(d) 1 Camp. 437.

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LORD ABINGER, C. B.—This rule must be discharged. It appears that Mr. Armstrong has not made a claim nor did he ever intend to make any in respect of this disbursement; and I cannot discover that any part of the statute requires a bill to be delivered under such circumstances.

PARKE, B.—I am of the same opinion. The object of the statute is, that the client is not to have too large a demand made upon him, but here the attorney makes no charge whatever. Whether or not this might be a taxable item in a case where the attorney was to be paid for his trouble I do not give any opinion, but here, where he was conducting the case without fee or reward, it certainly was

ALDERSON, B.—In *Prothero v. Thomas* (a), Gibbs, C. J. lays down the proposition, that a bill is necessary where the attorney has made disbursements, or is about to sue for compensation for his trouble. I think it very doubtful whether this is a taxable item at all, but under the circumstances it certainly is not.

Rule discharged.

(a) 6 Taunt. 195.

DOE d. ROBERTS v. ROBERTS.

If an infant lessor in ejectment is a pauper, the court will require him to find some person to be security for the defendant's costs.

BAYLEY had obtained a rule calling on the lessor of the plaintiff to give security for costs, on the ground that he was an infant. He cited *Doe d. Selby v. Alston* (a).

Jerris shewed cause, upon an affidavit that the infant was a pauper.

Bayley, in support of the rule, referred to Anon. (b) as

(a) 1 T. R. 491.

(b) 1 Wils. 130.

an authority that in such case the lessor of the plaintiff will be required to find some person to be security for him.

The Court discharged the rule upon the terms that the infant's father should be substituted for John Doc.

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 —————
 Doe
 d.
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 v.
 ROBERTS.

—◆—

JONES v. SMITH.

ADDISON had obtained a rule to shew cause why the judgment signed in this case for want of a plea should not be set aside for irregularity. The defendant, who was a married woman, had pleaded her coverture. The plaintiff treated this plea as a nullity and signed judgment, on the ground that it did not state the husband to be within the jurisdiction of the Court, nor was there any affidavit stating his place of residence, with convenient certainty, as required in pleas in abatement for non-joinder.

A plea of the coverture of the defendant is not within the 8th section of the 3 & 4 W. 4, c. 42, which requires pleas in abatement for non-joinder to state that the person not joined is resident within the jurisdiction of the Court, &c.

James shewed cause, and relied on the 3 & 4 Will. 4, c. 42, s. 8, which enacts, that "no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea."

PARKE, B.—The section referred to does not apply to any case of non-joinder, except where the plaintiff can go on against the party pleading in abatement. This view of the case is confirmed by the 9th and 10th sections; the former enables the plaintiff to reply the bankruptcy or insolvency of the party not joined; and the latter enables

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the plaintiff to enter up judgment against the original defendants, in case it shall appear that the persons named in the plea in abatement are not liable.

Rule absolute.

LUMLEY v. HEMPSON.

The rule which requires a term's notice where no step has been taken in the cause for more than four terms, does not apply to an application to set aside proceedings.

PLATT had obtained a rule calling on the defendant's attorney to shew cause why all proceedings in this case should not be set aside. It appeared that the writ issued in February, 1836. On the 18th of March an order was obtained staying all proceedings until the 5th day of the ensuing Easter Term, since which time, no further step had been taken in the cause.

Chilton shewed cause, and objected that as more than four terms had intervened, no step could now be taken without a term's notice. [*Parke, B.*—Will that rule apply to an application to set aside proceedings? This is not a step in the progress of the cause, but an application to stop it.] The rule of the Common Pleas, E. T. 13 Geo. 2, cited in *May v. Wooding* (a), orders, "that in all cases in which there have been no proceedings for four terms, &c., the party who desires to proceed again shall give a term's notice to the other of such proceedings. In *Tipton v. Meeks* (b), where the plaintiff obtained a rule for a new trial, but neglected to carry down the cause for more than four terms, the court would not discharge the rule on motion, a term's notice of such motion not having been previously given.

PARKE, B.—The rule requiring a term's notice where no step has been taken for more than four terms does not

(a) 3 M. & S. 500.

(b) 8 Moore, 579.

apply here. The plaintiff does not seek to take a proceeding to judgment, but says the past proceedings are entirely wrong, and applies to the equitable jurisdiction of the Court to set them aside. The object of the rule requiring a term's notice is, that one party may be forewarned of an intention which the other may entertain to take a step in some proceedings to judgment, which have been suspended for four terms.

The rule was subsequently discharged upon another ground.

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BAXTER v. BAILEY.

BALL had obtained a rule nisi to discharge the defendant out of custody, on the ground that he had not been charged in execution within two terms after trial, as required by H. T. 2 Will. 4, s. 85, 1 Reg. Gen., and final judgment signed in Michaelmas Term. The cause was tried at the sittings after Trinity Term, 1837 (a). In the following Michaelmas vacation the defendant rendered in discharge of his bail, and at the commencement of the present term he was charged in execution. It was contended that Trinity Term counted as one of the two terms, and that therefore the defendant ought to have been charged in execution in Michaelmas Term.

Where the trial took place at the sittings after Trinity Term, final judgment in Michaelmas Term, and in the following vacation, the defendant rendered in discharge of his bail:—*Held*, that by the rule of this Court of T. T. 26 & 27, Geo. 2, the defendant should be charged in execution in Hilary Term.

Peacock shewed cause.—The question turns upon the construction to be put upon the rule of H. T. 2 Will. 4, s. 85, which requires, that “the plaintiff shall proceed to trial or final judgment against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms in-

(a) Ante, vol. 1, p. 194.

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clusive after such trial or judgment, of which the term in or after which the trial was had shall be reckoned one." As the defendant was not in custody at the time of trial, Trinity Term cannot be counted as one of these terms. The rule applies only from the time the defendant is proceeded against as a prisoner. Besides, it is not stated that the plaintiff had notice of the defendant's intention to surrender, and therefore it was not possible for him to comply with the terms of the rule.

Ball.—The plaintiff's affidavit states that the defendant rendered in discharge of his bail, which implies that the plaintiff had received notice of the surrender.

PARKE, B.—The first point does not depend solely on the construction of the rule of H. T. 2 Will. 4, but also on a rule of this Court of T. T. 26 & 27 Geo. 2, which directs that, in case of a surrender in discharge of bail after final judgment obtained, unless the plaintiff shall proceed to cause the defendant to be charged in execution upon the said judgment within two terms next after such surrender, and due notice thereof (of which two terms the term wherein the surrender was made shall be taken to be one) the prisoner shall be discharged out of custody by super-sedeas, unless good cause be shewn to the contrary." The question then is, whether a surrender in vacation has or has not, for this purpose, a reference to the preceding term, and the case of *Borer v. Baker* (a) decides that it has. The defendant ought, therefore, to have been charged in execution in Hilary Term. With respect to the other point, I think the statement which has been referred to in the plaintiff's affidavit sufficiently shows that he had notice of the surrender.

Rule absolute (b).

(a) Ante, Vol. 2, p. 608. (b) See *Colbron v. Hall*, ante, vol. 5, p. 534.

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PUGH v. ROBERTS.

TRESPASS for breaking and entering the plaintiff's dwelling-house and stable. Pleas, first, not guilty; secondly, as to breaking the dwelling-house and stable, that they were not, nor was either of them, at the said time when &c., the dwelling-house or stable of the plaintiff. The cause was tried before *Williams, J.*, at the last Merionethshire assizes, when the plaintiff obtained a verdict with one farthing damages. The Master on taxation having refused to allow more costs than damages,

Jervis obtained a rule nisi for the Master to tax the plaintiff his full costs, against which

N. Clarke shewed cause.—The plaintiff is not entitled to more costs than damages. Before the new rules, if the general issue only was pleaded, the plaintiff would not be entitled to full costs without a certificate under the 22 & 23 Car. 2, c. 9, s. 136. Here, the two pleas together amount to the old plea of the general issue.

PARKE, B.—The question is, whether the plea denying the house and stable to be the plaintiff's does not necessarily put the title in issue. We decided in *Purnell v. Young* (a) that this plea is a denial of title, and if so, must it not bring the title in question, so as to prevent the operation of the statute of Charles? The consequence is, that if the defendant chooses to plead such a plea he must pay the costs of trying it.

The rest of the Court concurred.

Rule absolute.

(a) Ante, p. 347.

Trespass for breaking and entering the plaintiff's dwelling-house, &c. Pleas, not guilty, and that the dwelling-house was not the plaintiff's. A verdict was found for the plaintiff with one farthing damages:—*Held*, that he was entitled to full costs, notwithstanding 22 & 23 Car. 2, c. 9, s. 136.

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COOPER v. MORECROFT.

To debt for money lent, the defendant pleaded *nunquam indebitatus* to all except 5*l.*, and as to that sum a set-off, for work and labour and money paid:—
Held, that upon these pleadings the defendant could not give evidence of payment of the plaintiff's claim.

DEBT for money lent, and money due upon an account stated. Plea, as to all except 5*l.* *nunquam indebitatus*, and as to five pounds, a set-off for work and labour, money paid and money due on an account stated. At the trial before the under-sheriff of Middlesex, the defendant tendered evidence of payment at different times, of sums covering the plaintiff's demand. It was objected that this evidence could not be received, there being no plea of payment, and *Belbin v. Bott* (a), and *Ernest v. Brown* (b), were referred to. The under-sheriff admitted the evidence, and a verdict was found for the defendant.

Busby, having obtained a rule to set aside the verdict, and for a new trial,

Hughes shewed cause, and contended that the evidence was admissible under the set-off for money paid.

PARKE, B.—I am of opinion, that upon these pleadings the defendant could not give evidence of payment of the plaintiff's claim. The plea of set-off is in fact a cross action.

Rule absolute.

(a) *Ante*, Vol. 5, p. 604.

(b) *Ib.*, p. 637.

SHACKEL v. RANGER.

The rule of H. T. 4 Will. 4, which requires every pleading to be dated, does not apply to a *similiter* added by one party for the other.

PLATT moved to set aside the notice of trial and subsequent proceedings in this cause for irregularity. The action was brought on a promissory note, the venue being in Gloucestershire. The defendant pleaded a special plea, to which the plaintiff replied concluding to the

country, and, without demanding a rejoinder or waiting four days, added the *similiter*, which had no date to it, and delivered the issue. Notice of trial was given on the 19th of March, the commission day at Gloucester being the 31st. The defendant was not under terms to rejoin gratis or take short notice of trial. The defendant's attorney returned the issue as irregular, and the plaintiff subsequently proceeded to trial, and obtained a verdict, the defendant not appearing. *Platt* contended that the *similiter* must be considered as a pleading, and therefore came within the terms of the rule of H. T., 4 Will. 4 (a), which required that every pleading as well as the declaration shall be entitled of the day of the month and year when pleaded. In *Worthington v. Wigley* (b), the omission to transcribe, into the issue delivered, the dates of the pleadings, was held to constitute a variance, of which the defendant was entitled to avail himself after trial.

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LORD ABINGER, C. B.—In this case, there seems to me no reason for dating the *similiter*. The object of giving a date is, that the other party may know when the pleading was delivered, but when the party delivers the pleading of the opposite party himself, he must know the date of it.

PARKE, B.—There is no doubt that when the plaintiff's pleading concludes to the country, he may add the *similiter*, and give notice of trial forthwith, and that the defendant, unless he is under terms, may strike out the *similiter* and demur. Here, all the defendant did was to return the issue. If we were called upon to decide this question for the first time, I should say that it is much more reasonable to decide that the rule applies only to cases in which the party delivers his own pleading, especially as the new rule is only a substitution for the old practice,

(a) Ante, vol. 2, p. 313.

(b) Ante, Vol. 5, p. 209.

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which required the date of the term only, and formerly when the similitur was added, no date of the term was required to it.

ALDERSON, B., concurred.

Rule refused.

BOOTH v. DRAKE.

In actions for false imprisonment the plaintiff is entitled to full costs, though he recovers less than 40s. damages.

TRESPASS for assault, battery, and false imprisonment. Plea, not guilty. At the trial, the imprisonment was proved, but there was no evidence of a battery, and a verdict was found for the plaintiff with one farthing damages. The Master, on taxation, having allowed the plaintiff his full costs,

Dundas moved for a rule nisi for the Master to review his taxation. It was formerly considered that a false imprisonment included a battery, but the case of *Rawlins v. Till* (a) shews that it does not necessarily follow that because there is an imprisonment there must be a battery. [*Parke*, B.—The cases are very strong the other way.] When one count of the declaration stated an assault on a man, and an assault upon the horse upon which he was riding, and the jury gave a verdict with general damages under 40s., it was held that the plaintiff was entitled to no more costs than damages: *Bannister v. Fisher* (b). In *Emmett v. Lyne* (c), the plaintiff declared for an assault, battery, and imprisonment, and no battery was proved, but only an imprisonment, and it was held that the Judge had power to certify under the 43 Eliz. c. 6. In an action for assault, battery, and false imprisonment, if the verdict be for less than 40s., and the Judge certify, the plaintiff will be deprived of costs though a battery was proved at the trial: *Wiffin v. Kincard* (d).

(a) Ante, p. 159.

(b) 1 Taunt. 357.

(c) 1 New Rep. 255.

(d) 2 New Rep. 471.

PARKE, B.—It has been the constant practice in all actions of false imprisonment to tax the plaintiff his full costs, notwithstanding he recovers less than 40s. damages. The action in fact is not for trespass or battery, but for depriving the party of his liberty.

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Rule refused.

HOLLINGDALE v. LLOYD.

HEATON had obtained a rule to shew cause why the bail-bond given in this cause should not be delivered up to be cancelled on entering a common appearance, on the ground that the defendant was a married woman. The affidavit in support of the motion, stated that the defendant was arrested on the 11th of April for 30*l.*, being the amount of a bill of exchange drawn by the plaintiff on and accepted by the defendant; that at the time the defendant gave the bill, she informed the plaintiff that she was a married woman living with her husband. A copy of the marriage certificate was set forth.

The Court will discharge a married woman on entering a common appearance, unless the plaintiff swears that at the time of making the contract, she represented herself to be a feme sole.

Cleasby shewed cause upon an affidavit which stated that the defendant had, at various times, obtained goods of the plaintiff to the amount of 30*l.*, and that the bill was given on account of this debt; that she did not, at the time she obtained the goods, or at any other time, until after the arrest, inform the plaintiff that she was a married woman: that she was possessed of houses and other property at Gravesend, and on the 25th April, 1837, gave the plaintiff an order on one of her tenants for the payment to him of 1*l.* on her account, which the tenant declined to do in consequence of the defendant having then received the whole amount of rent due to her: that the defendant resided at Gravesend for nearly twelve months, during which period she was not living with her husband, nor was she

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known to the plaintiff as a married woman. *Cleasby* referred to *Slater v. Mills* (a), and contended that the ground of that decision was that the plaintiff knew the defendant was married at the time of arresting her.

PARKE, B.—It is the uniform rule to discharge a married woman on entering a common appearance, unless the plaintiff swears that at the time of making the contract she represented herself to be a feme sole.

Rule absolute.

(a) Ante, Vol. 1, p. 230.

SHARPE v. WAGSTAFF.

In an action on an apothecary's bill it is not necessary to plead that the plaintiff was not in practice prior to or on the 5th of August, 1815, or had not obtained his certificate pursuant to the 55 Geo. 3, c. 194, s. 21.

DEBT for work and labour as an apothecary. Plea, *nunquam indebitatus*. At the trial, before the undersheriff of Middlesex, the plaintiff having proved his claim, it was objected on the part of the defendant, that the plaintiff had given no evidence, that he was actually practising as an apothecary before or on the 1st of August, 1815, or that he had obtained a certificate to practise as an apothecary pursuant to the 55 Geo. 3, c. 194, s. 21. On the part of the plaintiff it was contended, that the objection ought to have been taken by plea. The undersheriff directed a nonsuit, with liberty for the plaintiff to move to set aside the nonsuit and enter a verdict in his favour for 40s.

Thomas having obtained a rule accordingly,

Heaton shewed cause.—The question turns upon the 55 Geo. 3, c. 194, s. 21, which enacts that “no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the

trial that he was in practice as an apothecary prior to or on the said 5th day of August, 1815, or that he has obtained a certificate to practise as an apothecary from the said master, wardens and society of apothecaries as aforesaid."

This is not a matter which is required to be pleaded, as it is not in fact a defence; but proof of the certificate is a condition precedent to the plaintiff's right to recover. The rule of Court requires "that all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." This rule cannot be considered as extending to cases like the present, where the plaintiff is bound to give, in the first instance, certain evidence, to entitle him to recover. The question arose in the case of *Morgan v. Ruddock* (a), and *Patteson, J.*, in delivering judgment after consideration, says: "The statute has made the proof of the practice or certificate a condition precedent to the plaintiff's recovery, and therefore he must prove it as a part of his case. If I were to decide that the defendant must plead such a matter, the decision would operate as a repeal of the act of Parliament of 55 Geo. 3, c. 194, s. 21. The 3 & 4 Will. 4, c. 42, s. 1, contains an exception in favour of persons who are empowered by act of Parliament to plead the general issue and give the special matter in evidence. This proviso clearly shews that the recent statute was not intended to interfere with the right of the defendant to plead the general issue, and give the special matter in evidence under that plea, wherever that right was secured by act of Parliament, and therefore à fortiori it did not intend to relieve the plaintiff from proving certain matters as part of his case where an act of Parliament required it to be done. It appears to me, therefore, that the plaintiff would not be

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(a) Ante, Vol. 4, p. 311.

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entitled to recover without giving such proof as the act of Parliament required, and therefore that the defendant was not bound to plead it. The objection is, in fact, founded on a defect in evidence on the part of the plaintiff, and not on a matter which the defendant ought to have pleaded." In *Wills v. Langridge* (a) it was also held that this was not a matter which ought to be pleaded, since, in the nature of things, the defendant could not be expected to know whether the plaintiff filled the character in question or not. [*Alderson, B.*—How is this case different from that of an attorney who has not taken out his certificate?] The distinction is adverted to in the case of *Lane v. Glenny* (b), where *Littledale, J.*, observes—"The difference between the positions of attornies and apothecaries is this: as to attornies they are competent to make a contract, but are disabled from recovering upon it if it appears that they have not complied with the provisions of the statute. But as to apothecaries, the legislature deprives them of all capacity to make a contract unless duly qualified;" and *Patteson, J.*, says: "The case of *Morgan v. Ruddock* was decided simply on the words of the statute, which provide, that an apothecary shall not recover unless he shall *prove on the trial* that he was duly qualified. It is impossible, therefore, without repealing the statute, to hold him entitled to recover unless he does give such proof." In *Field v. Woods* (c), which was an action on a banker's check which appeared to have been post-dated, it was held that the objection of the want of a stamp might be taken advantage of without pleading it. [*Alderson, B.*—The plea of non-assumpsit puts in issue the matters of fact from which the contract or promise is to be implied; does the act make the certificate one of these matters of fact?] There can be no legal contract between the parties unless the plaintiff has a certificate. [*Parke, B.*—You will not

(a) 5 Adol. & E. 383.

son v. *Roland*, ante, p. 271.

(b) 2 N. & P. 258. See *Robin-*

(c) Ante, p. 23.

contend that if there was a plea of release or accord and satisfaction only on the record, it would be necessary to prove the certificate: the statute must therefore be read with some qualification.] If the contract is admitted by the pleadings, there would be a mere collateral matter to be tried. [*Parke, B.*—I should have very little doubt about it, but for the decision of the Court of King's Bench.]

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Thomas, in support of the rule.—This is a defence which ought to have been pleaded specially. The words “prove on the trial” mean that proof must be given if that matter is in issue. But the defendant may waive his right of compelling the plaintiff to prove that he is an apothecary, and may merely put him to the proof of his claim for medicines supplied. By not pleading the want of a certificate, the defendant must be considered as having admitted the plaintiff to be an apothecary. The argument on the other side must go to this extent, that the possession of a certificate forms part of the contract. If a good cause of action at common law appear in the declaration, the defendant must, since the new rules, plead any statutable illegality in the contract: *Barnett v. Glosop* (a). With respect to attornies, it has been expressly decided that the non-delivery of a signed bill must be specially pleaded: *Beck v. Mordant* (b); and there seems to be no real distinction between the cases.

Cur. adv. vult.

PARKE, B.—We have considered this case, and as we are only a Court of concurrent jurisdiction, we feel bound by the decision of the Court of Queen's Bench, whatever doubt we may feel upon the subject.

(a) Ante, Vol. 3, p. 625.
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(b) 2 Bing. N. C. 140.
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MAUDE v. MERSHAM.

To assumpsit for money paid the defendant pleaded as to 500*l.*, parcel &c., that he was possessed of a bill of exchange drawn by him upon and accepted by C. M., for payment of 500*l.* three years after date, and thereupon, in consideration that defendant would indorse the said bill to the plaintiffs, they agreed to pay and lay out for him 500*l.* in such sums as he should require:—*Held* bad, as amounting to the general issue.

ASSUMPSIT by the Darlington Joint Stock Banking Company for money laid out and paid to the defendant's use. Pleas, as to 500*l.* parcel &c., that on the 11th of January, 1836, the defendant was possessed of a certain bill of exchange, theretofore drawn by the defendant upon, and accepted by, one C. Mason, whereby the defendant required the said C. Mason to pay to him, the defendant, three years after the date thereof, the sum of 500*l.*; and thereupon, in consideration that the defendant would indorse the said bill to the said company, they then agreed with the defendant to pay, lay out, and expend for him 500*l.*, in such sums of money as the defendant should thereafter require: averment—that the defendant did indorse the said bill to the said company, and that the said company still hold the same for and on account of the said payments of 500*l.* so agreed to be laid out and expended for the defendant as aforesaid: that the 500*l.* in the introductory part of the plea mentioned, is the money paid in pursuance of such agreement.

Demurrer, assigning for cause that the plea is an argumentative, and amounts to the general issue.

W. H. Watson in support of the demurrer.—The plea clearly amounts to the general issue. The bill is stated to be given as a security for money, which is not payable until the bill becomes due. There could never then have been a promise to pay upon request. [*Parke, B.*—No doubt the plea would have been good if it had shewn the bill to have been given in payment of an existing debt, but in truth it shews a loan of money until the bill shall become due.]

Temple in support of the plea.—At the time of lending the money it is agreed that the bill shall be placed in the hands of the company. The bill, then, is a mere security for an existing debt.

PARKE, B.—The company are not to advance the money until after the bill has been indorsed to them; it follows, therefore, that there never was a promise to pay upon request.

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Judgment for the plaintiff.

POPE and Others v. BANYARD.

ASSUMPSIT for goods sold and delivered.—Plea, Non-assumpsit. The particulars stated the action to be brought to recover the sum of 3*l.* 17*s.* 6*d.*, being the balance due to the plaintiffs on the following account for goods sold and delivered to the defendant between August, 1832, and July, 1836.

The Blackheath Court of Requests, act 6 & 7 Will. 4, c. cxx. s. 22, excepts from the jurisdiction of the Court any debt "for any sum being the balance of an account originally exceeding 5*l.*:"—*Held*, that the commissioners had jurisdiction, where the account contained items amounting to above 5*l.* and reduced by payments below that sum, *it not appearing that at any one time so much as 5*l.* was due.*

	Dr.	£.	s.	d.
August, 1832.	To 1 ton of coals,	1	6	0
Nov.	1 ton do.	1	8	0
May, 1838	$\frac{1}{2}$ ton do.	0	12	0
April, 1834	$\frac{1}{2}$ ton do.	0	12	6
Oct. 1835	1 ton do.	1	10	0
Dec.	$\frac{1}{2}$ ton do.	0	16	0
Feb. 1836	1 ton do.	1	12	0
July.	$\frac{1}{2}$ ton do.	0	15	6
		£8	12	0

	Cr.	£.	s.	d.
June, 1833	By cash	1	0	0
April, 1834	do.	0	18	0
	do.	0	12	6
May, 1835	do.	0	10	0
Feb. 1836	do.	1	14	0
		4	14	6
	Balance—	3	17	6
		£8	12	0

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The cause was tried before the under-sheriff of Middlesex, when a verdict was found in favour of the plaintiff for the amount claimed.

In Hilary Term, *Welsby* obtained a rule to shew cause why a suggestion should not be entered on the record, in order to entitle the defendant to costs, under the Blackheath Court of Requests Act (6 & 7 Will. 4, c. cxx) (a). The affidavit on which the rule was obtained stated, that, at the commencement of the action, the defendant was resident within the limits of the jurisdiction of the above Court of Requests, and was liable to be summoned to that court for the debt.

Moody shewed cause.—This is an action for the balance of an account for goods originally exceeding 5*l.*, and which has been reduced by part payment, and therefore is not within the meaning of the act. A debt reduced by part payment is only recoverable in the

(a) 6 & 7 Will. 4, c. cxx. s. 21, empowers the Commissioners of the Court of Requests to decide and determine all disputes and differences between party and party for *any sum of money not exceeding 5*l.** in all actions or causes of debt, and in all causes of assumpsit and insimul computasent, &c. &c.

Sect. 22 enacts, that nothing in the act contained shall extend to enable the said court or judge to determine or decide on (inter alia) any debt for *any sum being the balance of an account originally exceeding 5*l.**

Sect. 74 enacts, that if any action or suit for any amount recoverable in the said Court of Requests, shall be sued or prosecuted

in any of his Majesty's Courts at Westminster, or elsewhere out of the said Court of Requests, and it shall appear to the Judge or Judges of the Court in which such action shall be tried, that at the time of commencing such action or suit, the defendant was within the jurisdiction of the said Court of Requests, and was liable to be warned and summoned before the said Court for such debt or demand, then and in such case the said Judge or Judges shall not allow to the plaintiff any costs of suit, but shall award that the plaintiff shall pay such costs to the defendant as he shall justly prove that he hath incurred in the defence of such action or suit.

inferior court, in cases, in which, by the terms of the act, the right to costs depends upon the amount recovered by the verdict: *Clark v. Askeu* (a). But in *Fountain v. Young* (b), where the exception in the statute (the Southwark Court of Requests, act 45 Geo. 3, c. 87) was of "any debt for any sum being the balance of an account on demand originally exceeding 5*l*." it was held, that a debt originally above 5*l*., but reduced below that amount by a part payment was within the exception. *Mansfield*, C. J., then says: "it seems to me, to have been the intention of the legislature, that long and intricate accounts consisting of various items should not be tried before this inferior tribunal. Upon the investigation of a case arising out of a debt, originally amounting to a considerable sum, but reduced by payments below 5*l*., many nice and difficult questions might arise." In *Abbey v. Lill* (c), the exception was of debts "for any sums being the balance of an account or demand originally exceeding 5*l*," and the Court held, that an action to recover 3*l*. 6*s*. remaining due on a bill of exchange for 8*l*. 6*s*. with interest, was within the exception. This very point arose in *Moreau v. Hicks* (d), on the former Blackheath Court of Requests' Act, 47 Geo. 3, sess. 1, c. 14, and although the Court gave no decided opinion on the point, yet they seemed inclined to think that the case of a debt reduced below 5*l*. by payments from time to time, was within the exception, although it appeared that at no time was more than 5*l*. due. It is evident from these authorities, that when the jurisdiction of the inferior court depends upon the nature of the claim, and not upon the amount recovered by verdict, a debt reduced by part payment is not within the act. The omission of the words "on demand" in this, the amended act, shews an obvious intention

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(a) 8 East, 28.

(b) 1 Taunt. 60.

(c) 5 Bing. 299; 2 M. & P. 534.

(d) 2 Adol. & E. 782; 4 Nev. & M. 563.

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that the amount should be determined, not by the demand, but by the account. [*Parke, B.*—In order to determine whether the inferior court has jurisdiction, it is necessary to go through the account and ascertain whether at any one time the sum of 5*l.* was due. If the demand ever exceeded 5*l.*, the commissioners would have no jurisdiction.] Suppose the plaintiff had demanded the whole 8*l.* 12*s.* without giving credit for the payments made, could it be said, that the case would then have been within the act, there being no plea of payment on the record? It would be productive of much inconvenience, if a case like this be held within the act, for the commissioners cannot tell whether they have jurisdiction until they have gone into the case, and they may become liable to an action of trespass, without having the means of avoiding it.

Welsby, contra.—The latter observation will equally apply to the other class of cases where the jurisdiction is measured by the amount of the verdict. Here, it appears, that at no one time was there a debt of 5*l.* due, which distinguishes the present case from those cited. [*Parke, B.*—*Moreau v. Hicks* is certainly no authority one way or the other.] The argument on the other side must go to this extent, that if the defendant were to pay for every article except the last, on the day following that on which it was purchased, still the plaintiff might treat the last item as a balance of account, and subject the defendant to the costs of the superior court.

Cur. adv. vult.

PARKE, B.—In this case, an application was made to enter a suggestion to deprive the plaintiff of costs, on the ground that the defendant resided within the limits of the jurisdiction of the court for the recovery of small debts at Blackheath, and that the debt was recoverable in that Court. The case turns upon the question whether the

debt was recoverable as a demand within the 6 & 7 Will. 4, c. cxx. By the 21st section of that act it is provided, that it shall be lawful for the commissioners to decide and determine all disputes and differences between party and party for any sum of money not exceeding 5*l.* in all actions or causes of debt, and in all causes of assumpsit or insimul computassent, &c. And the 22nd section enacts, that nothing in the act contained shall extend to enable the said court to judge, determine, or decide on any debt for any sum being the balance of any account originally exceeding 5*l.* The question is, whether this action was brought for *the balance of an account originally exceeding 5*l.** We think it was not.

The plaintiffs sought to recover a balance of 3*l.* 17*s.* 6*d.* due for coals supplied at eight different times, between August, 1832, and July, 1836, in small quantities; on account of which payments were from time to time made, so that at no one time was so much as 5*l.* due from the defendant to the plaintiffs. We are of opinion that the Court of Requests had jurisdiction to decide upon this debt. The meaning of the term "originally," in the clause in question is somewhat obscure, but we think it is to be understood to apply to a case, where credit was given at one time for an amount exceeding 5*l.*, either in one or different sums, although *afterwards* the credit might have been reduced under that sum by part payments before the commencement of the suit in the superior courts, and that the act of parliament did not intend to deprive the Court of jurisdiction, whenever the plaintiff should claim on the credit side of his account against the defendant items altogether exceeding 5*l.*, and would in the usual conduct of a cause prove to that amount *originally in the first instance*, before the defendant would go into his case of payment. The latter construction might be more convenient to the commissioners, as they would have no difficulty in ascertaining whether they had juris-

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diction or not; but it would greatly narrow the utility of the Court, and disable creditors upon running accounts for very small sums from recovering a trifling balance. The former construction extends the jurisdiction of the commissioners, and gives them full power to decide in all cases except where the transactions have been on so large a scale as that credit is given at one time for an amount of above 5*l*.

It is true that the commissioners are, by this construction, placed in a situation of some difficulty; for, in taking the account they will have, if they wish to be quite secure, not merely to ascertain the amount of the debts and credits, but the state of the account at different times; and if they should find that 5*l*. was ever due at one time they cannot proceed, and the suit must be dismissed. Probably the practical inconvenience will be trifling.

For these reasons we think the rule must be made absolute.

Rule absolute.

CHILD v. MARSH.

Where a writ of summons stated the defendant to be resident within the county of Worcester, whereas he in fact resided within the city of Worcester, and was served there:—*Held*, that an application to set aside the service should be made within the time limited for entering an appearance.

BUTT shewed cause against a rule obtained by *W. H. Watson*, to set aside the service of a writ of summons for irregularity. The objection was, that the writ stated the defendant's residence to be in the county of Worcester, whereas he in fact resided within the city of Worcester, and was served there. The writ was served on the 21st of April, and on the 30th (which was Monday), the present rule was obtained. He contended that the application was too late. In *Tyler v. Green* (a), the writ was served on the 25th of October, and the application to set aside the service for irregularity was made on the 3rd of November, (the 2nd being a Sunday), and it was held to be out of

(a) Ante, Vol. 3, p. 439.

time, and that it should have been made on the first. *Edwards v. Collins* (a) is also an authority that the application should have been made within the time limited for entering an appearance.

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W. H. Watson contended that this was not a mere irregularity, but that objection rendered the service a nullity.

PARKE, B.—On the authority of those cases we think the application is too late.

Rule discharged, with costs.

(a) Ante, Vol. 5, p. 227.

DENDY v. POWELL.

DEBT for money paid, money lent, &c. Plea, "that the plaintiff before and at the time of the commencement of the suit *was indebted* to the defendant in &c., which said sums of money so due and owing from the plaintiff to the defendant, exceed the supposed debt above demanded, and all damages ever sustained by the plaintiff by reason of the detention thereof, and out of which said sums of money so due and owing to the defendant, he the defendant is ready and willing, and hereby offers, to set off and allow to the plaintiff the full amount of the said debt and damages according to the form of the statute in such case made and provided."

A plea of set-off must state that the plaintiff "still is" indebted to the defendant.

Special demurrer, assigning for causes that the said plea does not traverse or deny any material allegation in the declaration, nor does it confess or avoid the causes of action to which it is pleaded, in this, that though it sufficiently confesses and admits the said causes of action, yet the defendant seeks to avoid the same by stating that

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before and at the time of the commencement of the suit, the plaintiff was indebted to the defendant, without shewing or averring that the said supposed debt is still in existence, and unpaid and unsatisfied, and thus attempts, by inference only, to shew a debt in existence, whereas the plea ought to have averred that at the time of the commencement of this suit the plaintiff was and still is indebted, inasmuch as a defendant can set off only those debts which were due to him from the plaintiff at the time of the action brought, as well as at the time of plea pleaded; and for that it does not appear in and by the said plea, that there is any debt due and owing from the plaintiff to the defendant, whereas it ought to have been shewn and alleged affirmatively, that the said debt therein stated to be due and owing from the plaintiff to the defendant at the commencement of the suit, was still an existing debt, and ground of set-off; and for that the said second plea is uncertain, and that no certain or sufficient and material issue could be taken thereon, which would decide the case.

Wightman, in support of the demurrer, was stopped by the Court.

Hughes, in support of the plea.—The plea avers that there is a larger debt due from the plaintiff than that which he claims against the defendant, and the defendant offers to set it off. [*Alderson*, B.—Suppose the debt which forms the subject of the set-off, was paid after the writ was sued out and before plea.] The plea of set-off refers to the time of the commencement of the action: *Jackson v. Godard* (a). In *Evans v. Prosser* (b) it was decided that a plea of set-off that the plaintiff was indebted to the defendant *at the time of plea pleaded*, was bad, and that it should state that he was indebted at the commence-

(a) 1 C. & M. 46.

(b) 3 T. R. 186.

ment of the action. The words "still indebted" are immaterial, and no issue can be taken upon them. [*Alderson*, B.—The statute of set-off says that under the general issue, the defendant shall give a notice of set-off at the time of pleading the general issue. It is consistent with this plea that the defendant's claim may have ceased to exist since the action was brought.] In that case the plaintiff might have so replied.

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LORD ABINGER, C. B.—The Court are clearly of opinion that the plea is bad. It is true that all pleas refer to the commencement of the action, but at the time the suit is commenced the plaintiff has no means of knowing whether the defendant intends to plead a set-off.

PARKE, B.—If the argument urged to the Court is correct, this case might happen; that a defendant having a demand against the plaintiff arrests him, and the latter, for fear of going to prison, pays the debt, and then the defendant would again recover it upon the plea of set-off, and thus be doubly paid. This is not pleaded as an existing debt; then we cannot infer that it is so, but have a right to conclude that it is satisfied.

ALDERSON, B.—The plea must contain such a state of facts as to shew that it cannot be true, that the plaintiff has any right of action.

Judgment for the plaintiff.

JONES v. SHIEL.

BAYLY moved for a rule to compute principal and interest on a bill of exchange. The declaration contained

After the delivery of a declaration containing a

count on a bill for 216*l.* 14*s.*, and also counts for goods sold and money due on an account stated, the defendant paid to the plaintiff 150*l.* generally on account of the action:—*Held*, that the plaintiff could not have a rule to compute, while the count for goods sold remained in the declaration.

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a count on the bill which was for 216*l.* 14*s.*, and also counts for goods sold, and money due on an account stated. After declaration, the defendant paid to the plaintiff 150*l.* on account of the action, but without applying it specifically to any part of the demand. A rule to compute had been obtained, but the Master refused to compute on the ground, that under the circumstances there ought to be a writ of inquiry. It was contended, that as the 150*l.* was paid generally, the plaintiff had a right to apply it in discharge of the goods sold. [*Parke, B.*—Assuming that to be so, there must be at least nominal damages on that count.] He may enter a remittitur as to the damages on that count. [*Parke, B.*—No, he cannot, because he has received them.]

PARKE, B.—If the other side consent to your entering a *nolle prosequi* as to the counts for goods sold and on an account stated, you can then have a rule to compute, but as the case stands you must execute a writ of inquiry.

Rule refused.

WEST v. SMALLWOOD.

Trespass will not lie against a party who lays a complaint before a magistrate on a subject-matter over which he has a general jurisdiction, and the magistrate thereupon grants a warrant, although the particular case is one, in which, the magistrate had no jurisdiction.

TRESPASS for assault and false imprisonment. Plea, not guilty. At the trial before Lord *Abinger*, C. B., at the Middlesex sittings after Hilary Term, it appeared, that the plaintiff was a bricklayer, and was employed by the defendant to build some houses for him. While the work was going on, some dispute arose between the plaintiff and defendant, and the plaintiff in consequence refused to proceed with the work. The defendant then went before a magistrate, and laid an information against the plaintiff under the 4 Geo. 4, c. 34, s. 3. The magistrate having granted a warrant, the plaintiff accompanied the constable who had the execution of it, and pointed

out the plaintiff to him. Lord *Abinger*, C. B., was of opinion that trespass was not maintainable, and nonsuited the plaintiff.

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Kelly moved to set aside the nonsuit, and for a new trial.—It must be admitted that when an information is laid before a magistrate concerning a matter over which he has jurisdiction, and the magistrate grants a valid and legal warrant, under which the party is apprehended, the proper remedy is case. But where, the magistrate has no jurisdiction to interfere, all parties who have acted in respect of that imprisonment are liable in trespass. *Moravia v. Sloper* (a) is analagous to the present case: there, it was held, that when a party pleads a justification under the process of an inferior court, he must shew that the cause of action arose within the jurisdiction of that court. In *Rafael v. Verelst* (b) it was held that trespass was maintainable for compelling, contrary to his inclinations, a sovereign and independent prince to imprison the plaintiff. *Hardy v. Ryle* (c), and *Lancaster v. Greaves* (d), are authorities to shew that the 4 Geo. 4, c. 34, only applies where the relation of master and servant exists, and that this is not a case within that statute. [Lord *Abinger*, C. B.—I do not see how the defendant can be a trespasser. He goes to a magistrate and calls upon him to exercise his judgment, and though the magistrate, if he exceed his authority, may be liable in trespass, the party who laid the complaint is not. *Alderson*, B.—This is different from the case of a sheriff where there is a void judgment: there, the plaintiff puts the writ in motion, but here the defendant comes and asks the magistrate to interfere, under the 4 Geo. 4, c. 34, and it is the magistrate's fault if the party is wrongfully imprisoned. Lord *Abinger*,

(a) Willes, 30.

(b) 2 W. Blac. 983, 1055.

(c) 9 B. & C. 603.

(d) Id. 628.

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C. B.—The defendant cannot be said to put the magistrate in motion. When a party applies to a magistrate who has a general jurisdiction over the subject-matter, and states a case which the magistrate sees is not within his jurisdiction, but he nevertheless grants a warrant, how is the party complaining to be liable? *Alderson, B.*—In *Rafael v. Verelst*, Lord Chief Justice *De Grey* says, “I consider the Nabob as not being the actor in this case, but the act to be done in point of law by those who procured or commanded it, and in them it doubtless is a trespass.”] There is another ground upon which the case ought to have gone to the jury, viz. whether the defendant, by pointing out the plaintiff to the officer, did not make himself a party to the imprisonment. The onus of justifying the participation by the defendant in making the arrest lies on him, and the plaintiff may maintain the action without producing the warrant: *Holroyd v. Doncaster (a)*, *Elsee v. Smith (b)*.

Lord ABINGER, C. B.—When a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint, and the magistrate makes a mistake in supposing it to be a case upon which he is bound to exercise his jurisdiction, and grants a warrant, the party who is taken upon that warrant cannot have trespass against the complainant, but the only remedy is an action on the case if he has acted maliciously. The magistrate acting without any jurisdiction at all is liable as a trespasser, but the 24 Geo. 2, c. 44, protects the constable who acts under the warrant. With respect to the other part of the case, I do not deny that the fact of the defendant pointing out the plaintiff to the constable might be evidence to go to the jury, but that point was not pressed on the part of the plaintiff.

(a) 11 Moore, 440; 3 Bing. 492.

(b) 1 D. & R. 97; 2 Chit. 304.

BOLLAND, B.—I agree in opinion. With regard to the case of a sheriff, that is clearly distinguishable from the present, for there, the party puts the sheriff in motion, and the latter acts in obedience to him. Here, the party asks the magistrate how he advises him to act, and the magistrate says in the first instance that he thinks a warrant will lie. The complainant does no more than lay before a court of competent jurisdiction the grounds upon which he seeks redress, and the magistrate erroneously grants a warrant. As to the subsequent conduct of the defendant, he merely points out the plaintiff to the constable, and no malice whatever is shewn.

ALDERSON, B.—As to the first point, it seems to me that the party must be taken merely to have laid his case before the magistrate, who thereupon granted a warrant. Then, what has been done by the defendant to make him liable in trespass? The magistrate has granted a warrant, so far as we know, conformably to the statute. I am clearly of opinion, that the plaintiff is not entitled to recover in trespass, though he might maintain an action on the case, if he could shew a want of probable cause. But it is argued, that if the defendant got the constable to take away the plaintiff, the former is liable upon these pleadings. I agree, that if the defendant took an active part, he must have failed on the general issue, because it would then have been incumbent on him to shew by plea of justification, that he had a right so to do. Then comes the question, whether, in point of fact, any thing was done on the part of the defendant to cause the law to be put in force against the plaintiff. It appears that all the defendant did, was to point out the plaintiff to the constable. I think that question should have been left to the jury, but as the counsel did not press the point, we ought not to interfere.

Rule refused.

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CORNER Executor v. SHOVE Executor.

Reported. 4 M. & N. 103.

Counts for goods sold and delivered to the defendant as executor, and for work and labour done for the defendant as executor, cannot be joined with counts for money paid for the use of the defendant as executor, and for money due on an account stated with defendant as executor; but a count for money paid for the use of the defendant as executor may be joined with a count for money due on an account stated with defendant as executor.

If goods, or work and labour, are contracted for in the lifetime of the testator, and the contract is completed in the time of the executor, the plaintiff cannot recover on the common counts for goods sold and work and labour, but must declare specially.

ASSUMPSIT.—First count for goods sold and delivered by the plaintiff to the defendant as executor. Second count for work done, and materials provided by the plaintiff for the defendant as executor. Third count for money paid by the plaintiff for the use of the defendant as executor. Fourth count for money due on an account stated with the defendant, as executor, and that defendant as executor, promised to pay. Pleas, non-assumpsit, and ne unques executor. The cause was tried before the Secondary in London, when a verdict was found for the plaintiff.

Channell, in Michaelmas Term, obtained a rule to arrest the judgment, on the ground that the two first and the last counts were for causes of action, for which the defendant would be personally liable, and could not be joined with counts charging him in his representative character. He cited *Ashby v. Ashby* (a).

Platt shewed cause. With respect to the last count, it has been decided that an executor may be liable on an account stated in his representative character, *Rose v. Bowler* (b), *Ellis v. Bowen* (c), *Powell v. Graham* (d). He may also be liable as executor for work and labour, for if he neglect to give orders for the funeral of the testator, and have sufficient assets for that purpose, the law will imply a promise to pay the person who furnishes the funeral in a manner suitable to the testator's degree and circumstances, *Tugwell v. Heyman* (e), *Rogers v. Price* (f). If an action were brought by a creditor of the testator, he

(a) 7 B. & C. 444.

(b) 1 H. Black. 103.

(c) Forrest, 98.

(d) 7 Taunt. 580.

(e) 3 Camb. 293.

(f) 3 Y. & J. 28.

might give in evidence a payment for the funeral. The charging him as executor, is a benefit to him, as it gives him a claim upon the assets. Unless the contract stated on the record is impossible there is no misjoinder, and there is nothing impossible in an executor saying that he will not be personally responsible, but that the creditor must depend upon the estate for payment. [*Parke, B.*—Can an executor contract to make himself liable in his representative character only? *Alderson, B.*—It is clear he cannot be charged for money had and received by him as executor, and his saying that he would not be personally liable could make no difference.] Suppose a man contract for work to be done, and before it is done the party dies, is not his executor liable for it when afterwards completed? [*Parke, B.*—In that case the declaration should state the contract with the testator, that the work was incomplete at the time of his death, and finished afterwards, and that defendant as executor, then promised to pay.]

Channell, contra.—The question is, first, whether an executor can be liable as such for work and labour, and secondly, whether the form of pleading is right. *Rogers v. Price* does not affect the present case; it is doubtful whether the grounds of that decision can be supported. There, *Garrow, B.*, in delivering judgment, says: “Suppose a person to be killed by accident at a distance from home, what in such a case ought to be done? The common principles of decency and humanity, the common impulses of our nature, would direct every one as a preliminary step to provide a decent funeral, at the expense of the estate. It is not necessary, in that or in any other case, to wait until it can be ascertained whether the deceased has left a will, or appointed an executor, or, even if the executor be known, can it, when the distance is greater, be necessary to have communication with that ex-

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ecutor before any step is taken in the performance of those last offices which require immediate attention." This doctrine seems to have been disapproved of, in *Lucy v. Walrond* (a). The words, "as executor" in the first two counts must be rejected as surplusage. [*Alderson, B.*— Might there not be a case like that put by Mr. *Platt*, in which an executor says: "I will not be personally responsible, but only to the extent of the assets?"] In that case it would be necessary to declare as upon a conditional contract. Suppose the case of a single count for goods sold to the defendant, as executor; could he plead *plene administravit*? and if not, it follows that he is liable in his personal character. This difficulty is adverted to by *Hullock, B.*, in *Rogers v. Price*. [*Lord Abinger, C. B.*— Suppose a party contracts with another to build him a house, and the latter dies before the house is finished, and the builder goes on and completes it, in what way is he to charge the executor?] There, the executor would be liable to pay out of the assets. *Marshall v. Broadhurst* (b), is the converse of that proposition. There are cases in which a plaintiff may sue either in his individual or his representative character, but there is no case in which a defendant can be so sued. When work is completed subsequently to the death of the testator, the money when recovered would be assets. [*Alderson, B.*— Work done by the plaintiff as executor, is work done for the testator, so that it would seem to follow, there should be a special count.] Here, there are counts to which the same plea and the same judgment are not applicable.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court.— This was a motion in arrest of judgment, on the ground of a misjoinder of counts. The declaration contained four

(a) 3 Bing. N. C. 841.

(b) 1 C. & J. 403.

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counts in indebitatis assumpsit; the first count stating the defendant, *as executor*, to be indebted to the plaintiff for goods sold and delivered by the plaintiff to the defendant *as executor*; the second for work and labour performed, and materials supplied to the defendant *as executor*; the third for money paid for the use of the defendant *as executor*, and the fourth for money found to be due from the defendant *as executor* to the plaintiff on an account stated; and it was alleged, that the defendant *as executor* promised to pay.

To this declaration, there were two pleas—Non assumpsit, and *ne unques executor*; and on issue joined, a verdict was found for the plaintiff with general damages.

The objection was, that there was a misjoinder of counts, the last being clearly for a debt due from the defendant in his representative character: *Ashby v. Ashby*. The third count was admitted to be for a debt which might be due from the defendant in that character, for which the same case of *Ashby v. Ashby* is an authority, and therefore that count is not improperly joined with the last.

But the first two counts, it was contended, must necessarily be for debts due from the defendant in *his own right*, as no goods could be sold or work performed for another in his representative character.

To that, it was answered, first, that goods sold for the purpose of a funeral, and the expenses attending it, might be due from the executor as such, and the two cases of *Tugwell v. Heyman*, before Lord *Ellenborough*, and *Rogers v. Price*, in this Court, were cited as authorities, and secondly, that if goods were contracted to be sold to the testator, or work agreed to be done for him, and the goods were delivered to or the work completed for *the executor*, such demands might be recovered against the executor in his representative character under the first two counts.

With respect to the two cases above cited, it was, no

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doubt, decided by them that there is an implied promise on the part of an executor who has assets, to pay the reasonable expense of such a funeral of his testator as is suitable to his degree and circumstances. It was contended, however, at the bar, that those decisions were against a prior authority and were wrong—(a question upon which it is not necessary for us to give any opinion) but if they were right, the only point really determined was, that the law implies a contract on the part of the executor *personally*, and not in his *representative character*, and we are all of that opinion.

The implied promise cannot place the defendant in a different condition from that of having made an express contract to the same effect, which certainly would have bound him personally only, and none of the cases contain any authority to the contrary. In *Rogers v. Price* the report does not give the form of the declaration, it may have been against the defendant in his own right. In *Tugwell v. Heyman*, it seems to have been against the defendants as executors; but the question, whether the action would lie against them in *that character* was not raised; and if it had been raised, the answer would have been that if a defendant could not, under the circumstances, be liable for work and labour done for him *as executor*, those words in the declaration might be struck out as surplusage, which they would not be in a case in which the defendant could, in any supposition, be liable in that character to the contract declared upon.

In a recent case of *Lacy v. Walrond*, in which the declaration was against the defendant as administrator, for the expenses of a funeral, the point was not discussed, but the case was decided on the ground of the payment of money into court. We think, therefore, that the first two counts cannot be supported, on the ground that an executor, as such, cannot be made liable for the funeral expenses of a testator.

Nor do we think the plaintiff could have recovered under the first two counts, if the goods or work and labour had been contracted for by the testator and the contract completed by the plaintiff in the time of the executor. In one of these counts the goods are stated to have been sold to the defendant, and in the other the work and labour performed for him at his request, and neither of these averments would be true. In order to recover upon this supposed state of things the counts should have been differently framed.

We are therefore of opinion, that the first two counts are necessarily for debts due from the defendant in his own right, and consequently there is a misjoinder, and the rule must be absolute to arrest the judgment.

Rule absolute.

BALL v. BLACKWOOD.

THIS was an action by the indorsee against the acceptor of a bill of exchange. A *capias* had issued against the defendant directed to the sheriff of Worcestershire, but he had been guilty of negligence in not arresting the defendant, and proceedings were in consequence commenced against him. He subsequently applied to a Judge at chambers to stay proceedings upon payment of debt and costs, to be taxed by the Master, when an order was made to that effect.

In an action against the acceptor of a bill of exchange the sheriff is entitled to stay proceedings commenced against himself upon payment of the debt and costs in that action only.

R. V. Richards moved to amend the order by directing the Master to tax the plaintiff the costs of the drawer as well as the acceptor of the bill. Until the case of *The King v. The Sheriffs of London* (a), in the cause of *Hollier v. Clark*, it had always been the practice, where an

(a) 2 B. & Al. 192.

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attachment had been obtained in an action against the acceptor of a bill of exchange, to stay proceedings upon condition only of the sheriff paying the costs of any actions commenced against the drawer or indorsers of the bill. [*Parke, B.*—It is difficult to understand upon what principle the courts held the sheriff liable for the costs in the other actions. The case cited, is founded in good sense, and I see no reason why we should decide against it.] In *Rex v. The Sheriff of London*, in a cause of *Lazarus v. Tanner (a)*, where the sheriff had taken a bail-bond executed by only one surety, the Court refused to set aside, even on payment of costs, an attachment which had issued against him for not bringing in the body. If the acceptor of a bill applies to stay proceedings, he is obliged to pay the costs in the actions against the drawers and indorsers: *Smith v. Woodcock, Same v. Dudley (b)*.

PARKE, B.—The case of *The King v. The Sheriff of London*, in the cause of *Hollier v. Clark*, is an authority that the sheriff is to pay no more than what the plaintiff could have recovered in an action against the acceptor.

ALDERSON, B.—It is difficult to understand how the case of *Smith v. Woodcock* ever prevailed. The sheriff asks for no indulgence, he rather does a favour by paying the debt sooner than the plaintiff would otherwise have obtained it.

Rule refused.

(a) 2 Bing. 227:

(b) 4 T. R. 691. See the rule of T. T. 1 Vict. post.

1899.

EMMETT v. STANDEN.

DEBT.—The declaration contained counts for horse-meat and stabling, carriages kept, the hire of horses and carriages, and for money due on an account stated, and it alleged, “that although the defendant had paid the plaintiff parcel of the said monies, yet the residue, amounting to 62*l.*, is still due.” Pleas, first, as to all the monies in the declaration mentioned, except as to 10*l.* 13*s.*, parcel &c., *nunquam indebitatus*; secondly, as to the sum of 10*l.* 13*s.*, parcel &c., payment; thirdly, as to the sum of 10*l.* 13*s.*, parcel &c., the defendant says that the plaintiff ought not further to maintain his action in respect thereof, because the defendant now brings into Court the sum of 10*l.* 13*s.*, ready to be paid to the plaintiff. And the defendant further says, that he is not indebted to the plaintiff in a greater amount than the said sum of 10*l.* 13*s.*, in respect of the causes of action in the declaration mentioned, so far as the same causes of action relate to the sum of 10*l.* 13*s.*, parcel &c., in the introductory part of this plea mentioned.

As to the first and second pleas, the plaintiff did not reply. Replication to the third plea—“That the plaintiff, inasmuch as he admits that the defendant never was indebted to him in respect of the debt in and by the declaration demanded, to a greater amount than the said sum of 10*l.* 13*s.* paid into Court, he freely here in Court accepts the said sum of 10*l.* 13*s.* in full satisfaction and discharge of the debt in and by the declaration demanded, and of all damages by him sustained by reason of the detention thereof.

The particulars of demand gave credit for 10*l.* 13*s.*, and claimed a balance of 12*l.* 11*s.* 6*d.*

The defendant having signed judgment of non pros, for want of a replication to the two first pleas, *V. Lee* ob-

To a declaration in debt, alleging 62*l.* to be due, for horse-meat, &c., the defendant pleaded, 1st, as to all the monies in the declaration mentioned, except as to 10*l.* 13*s.* *nunquam indebitatus*; 2ndly, as to 10*l.* 13*s.*, payment; 3rdly, as to 10*l.* 13*s.*, payment of that sum into court.

The plaintiff did not reply to the two first pleas, but replied to the third, accepting the money paid into court in full satisfaction and discharge of the whole debt. The defendant signed judgment of non pros. for want of a replication to the two first pleas:—*Held*, on motion to set it aside, that the judgment was regular.

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tained a rule to set aside the judgment for irregularity, against which

W. Clarke shewed cause.—This case is distinguishable from *Coates v. Stevens* (a), since there, the money was paid into Court upon the whole declaration. Here, there are two pleas wholly unanswered. This being an action of debt, it was necessary to plead payment of the sum admitted in the particulars: *Ernest v. Brown* (b). In *Topham v. Kidmore* (c), which was an action of assumpsit for goods sold and delivered, the defendant pleaded, first, except as to 65*l.* 1*s.* 6*d.*, non assumpsit; as to 27*l.* 18*s.* 2*d.* part of the last mentioned sum, payment before action brought; as to 18*l.*, further parcel of the said sum, payment into Court of that amount; and as to the residue, a set-off. The plaintiff replied, accepting 18*l.* in satisfaction of his whole demand, taking no notice of the other pleas. The Court gave leave to the defendant to sign a judgment of non pros, unless the plaintiff amended his replication on payment of costs, or consented to taxation of costs as upon a nol. pros. in respect of the unanswered pleas.

V. Lee contra.—The action being brought for the balance of an account it was not necessary to plead payment. [*Parke*, B.—You have brought this mischief upon yourself by claiming in your declaration 62*l.* when only 12*l.* 11*s.* 6*d.* is due.] By the 19th rule of H. T. 4 Will. 4, a party is only entitled to costs, when he accepts the sum paid into Court in full satisfaction of his whole demand.

PARKE, B.—Here are the pleas of *nunquam indebitatus* and payment unanswered; those pleas must be disposed of some how or other. If you do not choose to go to trial

(a) Ante, Vol. 3, p. 784.

(b) 3 Bing. N. C. 674.

(c) Ante, Vol. 5, p. 676.

you must be non prossed. The case differs from *Coates v. Stevens*, because there, the money was paid into Court in satisfaction of the whole demand: it resembles the case of *Topham v. Kidmore*.

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Rule discharged.

MILLS v. STEVENS.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and seizing and distraining his goods.—The defendant pleaded, as to the breaking and entering the house, leave and licence; and as to the residue of the cause of action, not guilty. A verdict was found for the plaintiff, with 6*d.* damages, and the learned Judge certified to deprive the plaintiff of costs.

To a declaration in trespass for breaking and entering the plaintiff's dwelling-house, and seizing his goods; the defendant pleaded, as to the breaking and entering, leave and licence; and as to the residue of the cause of action, not guilty. A verdict was found for the plaintiff, with 6*d.* damages, and the Judge certified:—*Held*, that the Judge had power to certify, it not appearing that the question of title was in issue.

Butt moved for a rule nisi that the Master tax the plaintiff his full costs notwithstanding the Judge's certificate. He referred to *Purnell v. Young* (a), and *Smith v. Edwards* (b).

PARKE, B.—In *Wright v. Piggin* (c) it was held that you must look to the record to know if the plea necessarily raises the question of title. It is true that under the plea of not guilty the title might have been in issue, inasmuch as the question might have arisen whether the defendant was landlord of the premises, but that does not appear to have been the case.

Rule refused.

(a) Ante, p. 347.

(b) Ante, Vol. 4, p. 621.

(c) 2 Y. & J. 544.

1838.

FISCHER v. AIDÉ.

If, in an action *ex contractu*, the defendant pleads in denial or discharge of the action, and also pays money into court, each issue must nevertheless be tried as if it stood alone on the record.

ASSUMPSIT.—The declaration stated that by an agreement made between the plaintiff and the defendant, the defendant engaged the plaintiff as a courier or travelling servant, for five months, at the salary or wages of ten guineas per month, and that in case the defendant should discharge the plaintiff before the end of the five months, then the defendant undertook to pay the plaintiff the sum of fifty guineas, and his expenses from Carlsbad to England or Paris: it then alleged mutual promises, and that the plaintiff entered into the service of the defendant, and continued in her service in the capacity aforesaid, for the space of two months, and travelled with the defendant to Carlsbad: that defendant, on the 17th of January, 1838, discharged the plaintiff from her service and refused to pay him the said sum of fifty guineas, or the expenses of his journey back from Carlsbad to England or Paris. There was also a count for 5*2*l. 10*s.* for wages as a servant. The defendant pleaded first to the first count, except as to the sum of 2*1*l., parcel of the sum of 5*2*l. 10*s.* in that count mentioned, that during the time of service, the plaintiff improperly absented himself, and left the defendant without her consent, and did not return to the service of her the defendant: without this, that the defendant discharged the plaintiff from her service *modo et forma*. Secondly, as to the first count, except as to the sum of 2*1*l., parcel &c., that plaintiff refused to obey the lawful commands of the defendant. Thirdly, to the second count, except as to the sum of 2*1*l., parcel &c., non-assumpsit. Lastly, to the whole declaration, a payment into court of 34*l.* 18*s.* to which the plaintiff replied damages ultra.

At the trial before *Parke*, B., at the Middlesex Sittings after Hilary Term, a verdict was found for the defendant on the second and third issues, and for the plaintiff on the others.

It was contended by the counsel for the plaintiff, that the plea of payment into court admitted the contract, and that therefore, the plaintiff was entitled to a verdict for the full amount. The learned Judge reserved leave to enter a verdict for 52*l.* 10*s.*, or for nominal damages, if the Court should think the defendant entitled to recover on the plea of payment into court.

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Erle, and *W. H. Watson* shewed cause.—The 2*1st* mentioned in the second count, is a claim for the same services as are mentioned in the first count. There is no admission upon the face of the declaration that two twenty-one pounds are due. If there had been no plea of payment into court, the plaintiff could not have signed judgment. It is clearly unnecessary to specify how much is paid in upon each count, as the defendant does not admit any precise sums to be due, but only that some amount of damages had become due upon the whole declaration, and which damages must be proved, *Jourdain v. Johnson* (a). In *Mee v. Tomlinson* (b), the pleader endeavoured to avoid the difficulty by saying that the sums of money in the different counts were one and the same, and not other and different debts. Suppose a judgment by default and a writ of inquiry issued, the plaintiff could not in that case recover the two sums. [*Parke*, B.—Here is a count for wages: now the plea of payment into court admits some wages to be due, not exceeding twenty-one pounds.] It is the intention to apply this plea to the parts of the declaration unanswered. Under a plea of payment of money into court, and that defendant was not indebted beyond that sum, it is competent to make any defence which would have been applicable to the plea of nil debet, *Finleyson v. Mackenzie* (c). Payment of money into court on a pro-

(a) 2 C. M. & R. 564.

(b) 4 Adol. & E. 262.

(c) 3 Bing. N. C. 824.

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missory note, payable by instalments, is only an admission that money to the amount paid in is due upon the note; it does not bar the statute of limitations, as to a further sum claimed to be due on the same note. Here, the plea admits an agreement between the plaintiff and the defendant, and that the latter served two months, and that twenty-one pounds are due. If the declaration had contained but one count, these pleas would have been clearly inconsistent. [*Parke, B.*—Supposing there had been first a plea of non-assumpsit, and then a payment of 34*l.* into court, there must have been a verdict for the defendant; but the difficulty upon this record is, that there is no complete answer to the whole cause of action.] There are clearly inconsistent pleas upon the record, and the difficulty is caused by the plaintiff, who ought to have demurred.

PARKE, B.—I think I ought to have directed the jury that on the plea of payment of money into court, they should find a verdict for the defendant. As to the other point, all the Court agree in the opinion thrown out in the course of the argument, that when money is paid into court each issue ought to be decided by itself. If the plaintiff chooses to leave upon the record two inconsistent pleas, viz. one in discharge of the cause of action, and another of payment of money into court, he must take the consequences; but the issues raised must be tried by the jury. Here, as to the whole of the first count, except an undivided portion for services actually performed, the issue is, whether the plaintiff was improperly discharged for a breach of the lawful order of the defendant. That issue was found for the defendant, but there still remains an undivided portion unanswered. Then the plea of payment of money into court admits the cause of action mentioned in the declaration, and that the plaintiff is entitled to recover more than the 34*l.* 18*s.* paid into court. The true construction of the first count is, that the plaintiff has a

claim, not for any particular period which he has served, but that he has served for the whole time, that the real cause of action is complete, and that the defendant has discharged the plaintiff without a reasonable cause, and that the sum contracted to be given for his services is the amount of damage which he has sustained by the improper discharge. Supposing the first count contains enough to entitle the plaintiff to recover for the whole period, then I think we must consider that count as containing a double breach, and the defendant, by paying money into court, admits such breach. This being an agreement to pay a stipulated sum for a stipulated duty, the issues on this count must be found for the plaintiff. Then there is an undivided portion of the first count, and a portion of the second count left unanswered, the question then is, how much the plaintiff is entitled to recover for that part; we think him only entitled to nominal damages.

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ALDERSON, B.—I am of the same opinion. According to my view of the case, had there been no plea of payment of money into court, there would have been a complete answer to the plaintiff's claim.

Rule accordingly.

TWENLOW and Others v. ASKEY and Another, Assignees of WEBSTER, a Bankrupt.

ASSUMPSIT.—The declaration stated that before the making of the agreement thereafter mentioned, the plaintiffs were possessed of a certain stone-quarry, and agreed with Webster, before his bankruptcy, to permit him to take therefrom such quantities of stone as he might require for the purpose of building a certain church which he had

Where there are several pleas on the record, each plea must be considered as if it stood alone. Therefore, where in an action of assumpsit the defendant by one

plea denied the contract, and by another paid money into court, which the plaintiff accepted in satisfaction, and the jury found for the defendant on the first issue:—*Held*, that the defendant was entitled to retain the verdict, notwithstanding the second plea admitted the contract.

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undertaken to build at a certain price, to wit, &c.: that Webster, before he became bankrupt, agreed to pay for the same, and that in pursuance of the said contract, he did take therefrom divers large quantities of stone for the said purpose, and was indebted to the plaintiffs for the same in the sum of 50%, which said sum was still due and owing to the plaintiffs. The declaration then stated that Webster became bankrupt, and that the defendants were chosen assignees, and that at the time he so became bankrupt, the church which he had contracted to build was unfinished, and that the defendants, after they became such assignees, adopted the said contract of Webster to build the said church, and agreed to continue and to fulfil the contract made by Webster, and thereby, as assignees as aforesaid, became and were liable to and were bound by all the equities which Webster stood under with respect to the said contract, and one of which equities was to pay the plaintiffs the said sum of 50% for the said stone which he had so taken from the said quarry of the plaintiffs, and applied to the building of the said church: and thereupon, afterwards, in consideration that the plaintiffs would permit them as assignees to take such quantities of stone from the said quarry as might be necessary for completing the said contract so adopted by them, they promised to pay the plaintiffs the 50% for the stone taken by Webster before he became a bankrupt, and also for such quantities of stone as they, the assignees, should thereafter take for the purpose of building the church, and completing the contract. Averment, that they took from the quarry a certain quantity, to wit, &c., and became liable to pay for that together with the aforesaid sum of 50%, the sum of 95% in the whole. Breach, non-payment of that sum or any part thereof. Pleas—first, as to the said causes of action so far as they relate to the said supposed promise first mentioned, and which, it is alleged, that the defendants, as assignees, promised to pay for the said

quantities of stone taken by Webster, to wit, the sum of 50*l.* that the defendants did not promise modo et forma. Secondly, as to the residue of the said causes of action, payment into court of 6*l.* 12*s.* 11*d.*

The plaintiffs replied by accepting that sum.

The cause was tried before *Alderson*, B., at the Spring Assizes for the county of Stafford, when the jury found a verdict for the defendants on the first plea.

R. V. Richards had obtained a rule to shew cause why the verdict should not be set aside on the ground, that the payment of money into court upon one breach, admitted the contract alleged, and that the finding of the jury on the first issue, which negatived the contract, was inconsistent with the admission on the record. He cited *Dyer v. Ashton* (a), in which it was held that when two breaches were assigned in one count of a declaration upon a contract, and the defendant paid money into court upon one of them, he thereby admitted the whole contract as set out in that count.

On the case being called on for argument,

ALDERSON, B., said.—This case does not seem distinguishable from *Fischer v. Aidé* (b) already decided in this Court. The principle there laid down was, that each plea must be taken separately, and considered as if it were the only plea on the record. The rule must therefore be discharged.

BOLLAND, B., concurred.

Rule discharged.

(a) 1 B. & C. 3.

(b) Ante, p. 594.

COURT OF COMMON PLEAS.

Easter Term,

IN THE FIRST YEAR OF THE REIGN OF VICTORIA.


PARSONS v. PITCHER.

Where a party applies for a review of the taxation of costs, and the taxation is referred back to the Master, he is not entitled to the costs of the rule upon which the review is sought for and obtained.

W. H. WATSON shewed cause against a rule which had been obtained for a review of the taxation in this case. The taxation arose out of a decision of this Court on a rule in the same action during last term (*a*), and it was a case where the plaintiff brought an action to recover the sum of 16*l.*, and the defendant offered him 13*l.* in satisfaction of his demand. He refused to accept it, however, and subsequently, on his proceeding with the action, the defendant obtained an order for the payment of 11*l.* 8*s.* into court, which the plaintiff accepted in satisfaction of his demand, and it was held, on the authority of *James v. Raggett* (*b*), that the plaintiff was entitled to his costs incurred only up to the time at which the order was made. The ground on which the present rule was obtained was, that the Master in taxing the costs allowed the costs of that rule; and, that even supposing him to have been right in so doing, he had taxed some items upon the higher instead of on the lower scale, the amount recovered being less than 20*l.* It was now submitted, that the costs of the former rule were costs in the cause, incurred subsequently to the order for the payment of the money into court, and that they were therefore properly allowed to the defendant. It was clear that the rule did not seek for the rectification of an error in allowing items which ought

(*a*) Ante, p. 432.(*b*) 2 B. & Ald. 776.

not to have been allowed, but it sought that the principle on which the costs were to be taxed should be established, for which purpose an application to the Court was necessary. In the cases of *Jame s v. Raggett*, *Marryott v. Clapp* (a), and *Hale v. Baker* (b), it was clear that the Master could not tax the costs to the party of his own accord, and a special application to the Court became necessary, and the same rule applied here. The former rule did not ask for costs, and it was not in the nature of an interlocutory proceeding, but it was a mode of obtaining final judgment in the cause. With regard to the objection as to the costs being taxed on the higher scale, it could have no weight here, because it was not made before the Master.

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Wilde, Serjt., in support of the rule, said that he opposed the rule last term, not on the general practice to be adopted, but on the particular facts of the case, and his objection was, that the defendant did not avail himself of the Judge's order. The case of *James v. Raggett*, however, was cited, and the Court made the rule absolute on the general practice. That rule was in terms a rule to review the taxation of costs, and it was the universal practice that the party applying against such a decision got no costs, and it was so also on a reference to taxation.

TINDAL, C. J.—The general rule, I always thought, was, that if a case was referred back to the Master no costs were allowed, and if this case had been decided upon its own particular facts, the Court would have ordered costs. The rule must be absolute on the first ground, but as the other objection was not made before the Master, it must be discharged as to that.

Rule accordingly.

(a) Ante, Vol. 1, p. 701.

(b) Ante, Vol. 2, p. 125.

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MASON Administrator v. WHITEHOUSE.

Where a rule for an attachment has been issued against the plaintiff for non-payment of costs pursuant to the Master's *allocatur*, for not proceeding to trial, and he subsequently pays the costs as well as the costs of the attachment, if it appears that the original rule requiring the costs to be paid directed them to be paid to the defendant, and the demand is made by his attorney, the Court will not consider the plaintiff to be in contempt, but will order the costs of the attachment to be repaid to him.

WHATELY shewed cause against a rule obtained by *R. V. Richards* for setting aside a rule of this Court of the 13th of January, for reattachment for a contempt in the non-payment of costs pursuant to the Master's *allocatur*, and also the writ issued thereon; and also for the repayment by the defendant of 7*l.* 15*s.* 5*d.* paid as the costs of the said attachment, and for the payment by the defendant to the plaintiff of his costs occasioned by being taken into custody for the contempt. It appeared, that on Friday, the 22nd of December, 1837, the defendant's attorney called on the plaintiff, and served him with a copy of a rule of Michaelmas Term for the payment of costs occasioned by his not proceeding to trial, and also at the same time with a copy of the *allocatur*, whereby the sum of 4*l.* 17*s.* was allowed as the defendant's costs of the day, and the question was, whether the money to be paid, being costs on an *allocatur*, the defendant's attorney ought to have had a power of attorney from his client to enable him to make the demand. It was clear that the application to the plaintiff must be personal before any proceedings for an attachment could be taken, but it was submitted, that there was no authority to shew that the demand might not be made by the attorney. It was admitted that the rule required them to be paid to the defendant, the words "or his attorney" not being used, but it was submitted that this made no difference. A case had been decided in the Exchequer in the present Term, where the defendant having obtained a rule for the costs of the day for not proceeding to trial, the costs were taxed and demanded of the plaintiff by the defendant's attorney, and the Court held that that demand was sufficient to support an attachment. The costs, besides,

were of right payable to the attorney first, because he had his lien upon them.

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TINDAL, C. J.—The question is not, whether the attorney may demand them or not, but whether the plaintiff is to be treated as being in contempt, because he has not obeyed the command of the Court. The practice is, that the demand of costs shall be made by the person to whom they are made payable by the terms of the rule, or by some person deputed by him by letter of attorney. Here, however, there is no power of attorney.

Whately.—There is no dispute that the money is due, and it has been paid; but this is an attempt to procure the return of a portion of it.

R. V. Richards, contra, cited *Boulton v. Coghlan* (a) on the merits.

TINDAL, C. J.—All that the plaintiff wants are the costs of the attachment, and I think he is entitled to them. The justice of the case is, that the rule should not be absolute to the full extent.

Rule accordingly.

(a) 1 Scott, 688; 8. C. 1 Bing. N. C. 640.

Smith v. Thompson, 5. C. B. 486. 5. D. L. 530.

JAMES and Others v. BOURNE and Others.

Reported also in 4. Bing. N. C. 420.

KELLY moved for a rule calling upon the plaintiffs in this action to shew cause why the first or the second count

Where a declaration contains two counts, the first alleging a

contract on the part of the defendants to carry certain goods from a place beyond the seas to the port of London, and the second alleging a further contract to convey the goods from the wharf, when they should be landed in London, to the plaintiffs' warehouse in Ironmonger Lane, for a further reward, the Court will not strike out one of the counts on the ground of its being in "apparent violation" of the 5th rule of R. G. H. T. 4 Will. 4, by which several counts are forbidden to be put on record, unless a distinct subject-matter of complaint is intended to be established in respect of each. (Per Tindal, C. J., Park, J., and Bosanquet, J.; Coltman, J., dissentiente.)

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in the declaration should not be struck out under the rule of H. T. 4 Will. 4, s. 5, (a), by which it was provided that "several counts shall not be allowed unless a distinct subject-matter of complaint is intended to be established in respect of each." It was an action brought to recover the value of certain goods which had been shipped on board the defendants' vessel in Ireland to be conveyed to London; and which, on their being landed at a wharf in London, were destroyed by fire. The declaration contained two counts. The first alleged that the plaintiffs, on a certain day, at the defendants' request, caused to be delivered to the defendants divers goods and merchandise to be taken care of, and safely and securely carried and conveyed by the defendants in and by a certain steam-vessel of the defendants, from certain parts beyond seas, to wit, from Belfast to Dublin, and there to be reshipped into a certain other steam-vessel of the defendants, and to be by the defendants carried and conveyed in and by the said last-mentioned steam-vessel from Dublin aforesaid to London, and there to be delivered in the like good order and condition (all and every the dangers and accidents of the sea, steam-navigation of whatsoever kind excepted,) unto the plaintiff or his assigns, on paying for the said goods certain freight and charges, with primage and average accustomed: and thereupon in consideration of the premises, and of the said freight and reward, the defendants then promised the plaintiffs to take care of and deliver the said goods and merchandise as aforesaid. The declaration then alleged, as a breach, the non-delivery of the goods in the port of London. The second count alleged a similar employment by the plaintiffs of the defendants, and an engagement on the part of the defendants, in consideration of the premises, to take care of the said goods at the wharf when they should be landed from the said steam-vessel at the

(a) Ante, Vol. 2, p. 314.

port of London, and to carry and convey the same from such wharf to a place of business of the plaintiffs in Ironmonger Lane, and to deliver the same to the plaintiffs in a reasonable time for other reward to the defendants, and non-delivery was alleged as the breach. An affidavit was now produced, in which it was sworn that there was but one contract and one cause of action, and it was therefore contended that the case was within the rule, as the same cause of action was declared upon in two distinct counts. There was but one shipment and one contract, and both counts referred to the same goods. 'The case was clearly within the example given to explain the rule, for it was said "counts founded on the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract." 'The two counts here had relation to precisely the same matter, and they were only rather differently framed, and they both referred to the same contract and the same breach. The case had already been before *Park, J.*, at chambers, who declined to make any order upon the subject.

A rule *nisi* having been granted,

Stephen, Serjt., and Crompton, on a subsequent day shewed cause.—They contended that this was a matter which could be of no material importance to the defendants, because if one of the counts should not be established in evidence, they would be sure of their costs under the 7th section of the rule of court. There were two distinct cases provided for in the counts, that in the first count being the ordinary case of a count on a bill of lading, while the second alleged an undertaking to dispose of the goods in a particular way, which was independent of the bill of lading, and was in fact a special contract relating to a pe-

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riod of time subsequent to that, to which the bill of lading would run. The plaintiffs stood on two different rights, and it was not inconsistent with the rule of court that they should do so. The argument on the other side must go to the extent that it was a violation of the rule, if there were two counts growing out of the same transaction. But no decision to that effect had ever yet been given. The object of the rule was not to restrain a party from the use of so many counts as were necessary to give him a fair opportunity of recovering that which was due, but to prevent the useless prolixity of pleadings. The plaintiff could only recover one sum, and the test by which the question must be judged, was, whether there were two contracts. But these were separate and distinct contracts—the one for the conveyance of the goods to London, the other for the subsequent carriage of them from the wharf to the plaintiffs' house for a different consideration. The contracts were not the less different because they referred to the same goods, and in the event of this rule being absolute and the second count being struck out, no judge would allow a fresh contract to be introduced into the first count. *Guest v. Everest (a)*.

Kelly, contra.—There was no doubt that the Court had jurisdiction to interfere, and *Jenkins v. Treloar (b)* was an authority in favour of the application. The two counts must be taken to be on the same cause of action, for the only variance between them was, that in one of them the promise alleged was to deliver the goods in the port of London, while in the other it was stated to be to deliver them in Ironmonger Lane.

TINDAL, C. J.—This is an application to the Court, not by way of appeal from an order made by a Judge at cham-

(a) Tidd's New Pr. 218.

(b) Ante, Vol. 4, p. 690.

bers, but to the general jurisdiction which the Court possesses over its records; and I do not understand that the general power of the Court is at all taken away by the new rules; but, at the same time, I am bound to admit that in the exercise of our discretion, I think we are bound by those rules. The question therefore is, whether the allowing of these two counts to continue in the declaration is any violation of the new rules, and on the best construction which I can put upon them, I am of opinion that there is no violation of their provisions in allowing them to stand. Undoubtedly if you take the expression in the fifth rule, that "several counts shall not be allowed, unless a distinct subject-matter is intended to be established in respect of each," in its most general sense, this would be a breach of the law, which it is intended to establish, because it is impossible not to see that by the "subject-matter" would be meant the goods themselves, which were destroyed by fire. But, looking at the construction to be put on the rule in general cases, it seems to me that if on the words of the counts themselves, there appears to be any substantial or express distinction between the causes of action referred to in them, there is no violation of this rule in allowing them to remain. If they appear on the face of the counts to be substantially separate and distinct, and there is no reason to infer from any statement by affidavit that they may not have been separate contracts, arising with reference to the same subject-matter, it would not only be no violation of the rule to allow them to stand, but it would be an unnecessary exercise of the power of the Court to strike them out. Now, here there is no doubt, that the second refers to the same subject-matter as the first, so far as the goods are concerned; but then it states a separate contract, to carry them for a further reward from the place where they were first landed to Ironmonger Lane, and it is impossible not to see that it is on the face of it a separate and

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distinct contract from that contained in the first count. Looking at the examples given, it appears that the distinctions which the rules themselves establish with respect to the subject-matter of the action, are explained to be separate and distinct contracts. Let us take the first example, "Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed." There may be a bill of lading, by which it is undertaken to carry goods to the port of London and there deliver them; and there may be also established by evidence an undertaking for some further consideration, to take the goods from the place where they were first landed, and convey them further; and it does not appear to me that the latter contract would be a variation only from the first, but it would be a separate and distinct contract. There is a different contract for the payment of money, and a different liability to take the goods from the wharf to the plaintiffs' house, and a consequent different degree of liability in case the goods are lost before they arrive at the ultimate place of their destination. So, the next example is to the same purpose, and it seems to me that no inconvenience can really accrue to the defendants from this rule being refused. Looking at the construction of the rules themselves, I cannot arrive at any other conclusion than that which I have already expressed; and on the face of these counts it appears, that the second contains a contract distinct from that in the first, and a distinct and separate subject-matter of complaint, although they may both refer to the same subject-matter as being the foundation of the action.

BOSANQUET, J.—I am of the same opinion. This is an application to the general jurisdiction of the Court, to strike out one of the counts in the declaration, because it is improperly introduced, and there is no doubt that if it had

been so introduced, the Court might have ordered it to be struck out. But I am of opinion that there is not any violation of the rules. The question is, whether these two counts have been pleaded in "apparent violation" of the 5th rule, which is the expression used in the rule of Court, sec. 6; and I am of opinion that they are not apparently pleaded on the same subject-matter of complaint; but on the contrary, that they are apparently founded on different matters. It is said that they are both founded on one transaction, and so far as their being the same goods which were put on board the same vessel, to be brought to the same place, it seems to be so, but I can recollect that the word "transaction" was very much under consideration in forming these rules, when some expression was sought for, in order to afford a criterion of the counts being on the same subject-matter of complaint, and it was found to be insufficient, for there may be different subject-matters of complaint, arising out of the same transaction, and therefore, the words which are used were selected. If there was but one contract, and it was only differently described in the two counts, I should be ready to agree, that the case fell within the rule, and I am certainly by no means disposed to relax these rules, because I firmly believe that the 6th and 7th are necessary to carry the object of the 5th into effect, and to prevent any attempts being made to violate its provisions; but at the same time, when an attempt is made to violate the 5th rule, the 6th and 7th must be resorted to, if it is found that the 5th cannot be fully carried into effect. In the present case, the counts in the declaration are on different contracts, and different acts are alleged, which are stated to be on different transactions. In the first count, a bill of lading is alleged, by which it is contracted to bring the goods to the port of London; while in the second, a different undertaking is stated, to convey them after their arrival in the port of London, to a different place; it does not state

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for what reward, but it alleges that it is for a different reward. It appears to me, therefore, that they are apparently distinct contracts, and founded on distinct considerations. The same facts may be the foundation of different subject-matters of complaint, and of different contracts, and the same acts may be the breach of various contracts, as it happens in many cases. In *Jenkins v. Treloar*, the question raised was whether the two counts there pleaded were in apparent violation of the rule, and I do not wonder that there was a good deal of discussion, and doubt, whether they were or not, but the learned Judges decided that they were in apparent violation of the rule, because they were substantially on the same subject-matter of complaint; and I confess I think it was decided rightly, because it was the same duty, which was to be raised, whether it was called "metage" or by any other name. I am of opinion, therefore, that this rule should be discharged.

COLTMAN, J.—I have not been able to bring my mind to any satisfactory or definite view upon this subject. My learned brothers seem to entertain no doubt on the question, and appear to think that their view would best advance the justice of the case; but on the rule, I doubt whether it should not be properly considered that these counts are pleaded in apparent violation of its provisions. It appears to me that on the rule the thing to be looked at is, whether there is not a distinct subject-matter of complaint, and here it seems to me that there can be said to be only one distinct matter of complaint. I confess, also, I cannot reconcile the examples which are all given with this case; and I, therefore, go the length of saying that I am not quite satisfied with the rule laid down by my learned brethren; but at the same time I agree that the opinion expressed by the Court is best calculated to advance the justice of the case.

PARK, J.—As this rule is in the nature of an appeal from my decision at chambers, I requested my learned brothers to give their opinions before me. These rules are difficult to decide upon, and when the case came before me it was argued by counsel, and I think I came to as correct a decision as I could; agreeing with the Lord Chief Justice and my Brother *Bosanquet* on this occasion, that there are two distinct subject-matters of complaint, and that they are proper to be laid in two distinct counts. It seems to me that there are here two distinct grounds of complaint, and I therefore think that the opinions of the Lord Chief Justice and Mr. Justice *Bosanquet*, are right; and although I agree that perhaps the grounds on which these rules were framed, or the improper extending of the pleadings, and also to prevent a Judge at chambers being imposed upon, yet I cannot think that there is much imposition when a party puts two little counts in his declaration instead of one; and, at all events, I think that the object of these rules was to stop those “poetical effusions” in which special pleaders formerly indulged.

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Rule discharged.

HARRISON v. TAIT and Others.

W. H. WATSON moved for a rule calling on the defendant to shew cause why the demurrer to the replication delivered in this case should not be set aside for irregularity. There were thirteen defendants in the action, and there were several sets of pleas delivered, but they set up one defence that they were co-partners in a joint stock company, but that as they had acted illegally as a corporation, they were not liable to pay the sum for which the action was brought. The plaintiff replied *de injuriâ*, and

being made dies non by the rule of E. T. 2 Will. 4, the defendant was in time on that day to strike out the *similiter*, and demurr to the replication.

The plaintiff in the action having replied *de injuriâ*, and added a *similiter*, delivered his pleading on the 11th of April. Good Friday fell on the 15th of the same month, and it was held that the succeeding days up to the 18th, that day to strike

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added a similiter to the replication for the defendants, and delivered the issue on the 11th of April. On the 18th of the same month the issue was returned, the similiter being struck out, and the defendants specially demurred to the replication. It was submitted that the time for demurring had passed, and that this step was therefore irregular.

Crompton shewed cause, and admitted that under ordinary circumstances the demurrer ought to have been delivered on the 15th. That, however, was Easter Sunday, and the two following days being holidays, it was not delivered until the Wednesday. It was a substantial demurrer to the replication, and it was delivered as soon as possible, for Good Friday and the subsequent days up to the 18th, were dies non under the rule of E. T. 2 Will. 4 (a). The mode, besides, in which the plaintiff should have taken advantage of the irregularity, if it should be found to be one, was by returning the demurrer, and not by coming to the Court. He cited *Blackburn v. Peat* (b), and *Charnock v. Smith* (c). It was denied that the issue had been delivered, but the replication, with the similiter added, was all that the defendant had received.

W. H. Watson, contra, urged that it had been established as the practice that when the replication concluded to the country, the plaintiff might make up and deliver the issue forthwith: *Tidd's Practice* (d). It was also laid down in the same book (e) that when the similiter was added to the replication, and the defendant demurred to the replication, he must strike out the similiter and deliver his demurrer within four days.

TINDAL, C. J.—The statute 2 Will. 4, c. 39 having been passed after the rule of Easter Term 2 Will. 4 was pro-

(a) Ante, Vol. 1, p. 423.

(b) Ante, Vol. 2, p. 293.

(c) Ante, Vol. 3, p. 607.

(d) Ed. 9, p. 718.

(e) Id. p. 726.

mulgated, it becomes necessary for us to see whether the provisions in that act alter the effect of the rule, and the material section is the 11th, but on that, it appears, that the rule is left untouched. Then what is the rule? It directs, "That the days between the Thursday next before, and the Wednesday next after Easter-day, shall not be reckoned or included in any rules or notices or other proceedings, except notices of trial and notices of inquiry, in any Court of law at Westminster." The question therefore is, whether this is not an ordinary "proceeding" in the cause, and I think it is. The replication has been delivered, and the party is dissatisfied with it and returns it, expressing just dissatisfaction. If it had been returned within four days, it would have satisfied the usual practice, but that would have brought it to the 15th of April, which was Easter Sunday. It could not be required to be delivered on the 12th, and the first day on which proceedings could afterwards be taken was Wednesday the 18th of April. The rule must be discharged, the costs to be costs in the cause.

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PARK, J., concurred.

COLTMAN, J.—The 11th section of the act of Parliament is intended to meet a specific inconvenience, and it is not intended to alter the practice established by this rule of Easter Term, 2 Will. 4. The present case, in my opinion, expressly falls within the terms of that rule.

Rule discharged (a).

(a) *Bosanquet, J.*, was absent.

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MALINS v. FREEMAN.

A purchaser of goods at an auction cannot, by refusing to pay the auction duty to which he is made liable by 17 Geo. 3, c. 50, s. 8, make the bidding void, and a plea therefore alleging the contract to be void on such a ground:—*Held*, bad on demurrer.

THIS was an action of assumpsit, for goods bargained and sold. The defendant pleaded that the goods were put up to auction, and that by the conditions of sale the duty was to be paid by the purchaser. That the defendant was the highest bidder, and that the goods were knocked down to him, but that subsequently he refused to pay the auction duty, whereby the bidding and contract became void to all intents and purposes. To this plea, the plaintiff demurred.

W. H. Watson, in support of the plea, was called on by the Court, and he submitted that as by the act, the payment of the duty was necessary to complete the contract, no binding contract had been entered into in the present case. It was distinctly provided by the 8th section of the stat. 17 Geo. 3, c. 50, after making it competent to the auctioneer to charge the duty to the purchaser, that “upon neglect or refusal to pay the same, the bidding should be null and void to all intents and purposes.” There was nothing in the act to qualify this expression, and its meaning must be such as that which the defendant here sought to establish. *Phillips v. Bistolli* (a), decided that it was for the plaintiff to make out a binding contract, and Sugden’s V. & P. (b), was also in point.

R. V. Richards, contra, submitted that the defendant could not take advantage of his own wrongful act. The contract being void, must be at the option of the vendor. *Doe d. Bryan v. Bancks* (c).

TINDAL, C. J.—The words of the act are large, that nothing is to restrain the auctioneer from making it a con-

(a) 3 Dowl. & Ry. 822; S. C. 2 B. & C. 511.

(b) P. 44.

(c) 4 B. & Ald. 401.

dition of sale, that the purchaser shall pay the auction duty; and he is authorized to demand it, and in the event of a refusal to pay, the bidding is to be void. I cannot distinguish this in principle from the case of *Doe d. Bryan v. Banks*, and there it was held, that a lease of coals, containing a proviso that it should be void to all intents and purposes, if the tenant should cease working, was not absolutely void by the lessor ceasing to work, but voidable only at the option of the lessor, and not of the lessee. We must put an analogous construction upon the act, otherwise we should convert this provision, which is intended to be a protection to vendors, into one favourable to purchasers, and by which frauds might be committed.

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PARK, J., concurred.

BOSANQUET, J.—The word “void” may in some cases, be construed as meaning “voidable.” The provision here introduced is meant to be in favour of vendors.

COLTMAN, J.—It is so contrary to natural justice, that a party should be able to defeat his own contract, that it is impossible to avoid construing this act in the way suggested by the Court. There are many cases which shew that this construction must be adopted.

Judgment for the plaintiff.



See Ex parte Hutchinson 5. C. B. 429.

In re EADY and Others.

MEREWETHER, Serjt. moved that the acknowledgment of the applicant, who was a married woman, might be

An affidavit of verification of the certificate of the acknow-

ledgment of a married woman under the Fines and Recoveries Act, the parties being resident in Germany, must be sworn before a native court, and an affidavit sworn before the English Consul is not sufficient.

It is no objection to an affidavit sworn before a native court, that it is originally in the German language, if it is translated, and the translation verified: and the oath may be administered in the German language if it is translated by an interpreter to the deponent.

It is sufficient that the affidavit should be signed by the Judge of the country, and that the deponent's signature should not be attached, the Judge's signature being verified, and an affidavit being produced that such is the course of practice in Germany.

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taken, under the Fines and Recoveries Act, (3 & 4 Will. 4, c. 74.) The applicant was resident at Hamburg, and the affidavit of verification of the certificate of acknowledgment was made before the British Consul there. On the papers being produced to the officer of the Court, he refused to take them because they were not sworn before the proper officer. It was deposed, however, that the consul was the only person in Hamburg, who would or could swear the affidavit; and it was submitted that the Court would deal with the application as the necessity of the case required.

PARK, J.—There may be a question whether it would be a legal conveyance of the property, if the affidavit is not properly sworn.

Merewether submitted that it was only for the Court to be satisfied, and that the allegation that the consul was the only person who would swear it, should be deemed sufficient.

TINDAL, C. J.—You had better renew the application with fresh affidavits, and let there be some one who has applied to the Courts, who has got a direct and distinct refusal to swear the affidavits. Let it be some native authority, and let the authority be certified by the consul.

On a subsequent day in term,

Wilde, Serjt., renewed the application, and produced affidavits, in which it was sworn, that an agent had been sent to Hamburg, with proper instructions, and he had procured an affidavit of verification to be sworn before a Judge of one of the native courts. The affidavit was in German, but there was a translation of it into English, which was verified by a notary, and the oath had been administered in German, but was interpreted to the deponent in English. The signature of the deponent, how-

ever, was not attached to the affidavit, it being contrary to the practice of the Courts in Hamburgh, that any signature should be attached to an affidavit, except that of the Judge before whom the oath was administered. The signature of the Judge was here appended to the document, and it was verified by a notary. It was besides sworn, that the Court refused to swear the affidavit in the English language, and that there was no person in Hamburgh authorized to swear such an affidavit, except the English consul, and the affidavit sworn before him, and which had before been produced, was now in Court.

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TINDAL, C. J.—There is no objection to the oath having been administered in German and interpreted; the same rule of practice is adopted here. The only thing wanted is an affidavit to state that it is the law of Germany, that the deponent is not allowed to sign his affidavit.

Wilde submitted, that the signature of the Judge being appended to the affidavit was a sufficient guarantee of the course always pursued.

TINDAL, C. J.—I think the clerk had better swear that he believes the course which has been adopted, is that which is regularly taken in Germany. To the eye of a person merely looking at the affidavits, the evidence would otherwise appear incomplete.

Rule accordingly.

WOOLFE v. COOPER.

TALFOURD, Serjt., moved for a rule, calling on the defendant to shew cause why the certificate of the arbi-

Where, in an order of nisi prius, the whole cause and all

matters in difference are referred to arbitration, the arbitrator is in the character of a jury and shall find for the defendant on those issues only which are proved by him, even although it is directed that if the arbitrator shall find that the plaintiff is not entitled to recover any damages at all, a verdict shall be entered for the defendant.

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trator should not be amended, by the entering of a verdict for the plaintiff on the second and fourth issues, or why the certificate should not be referred back to the arbitrator, in order that he might amend it. It was an action of assumpsit, and the declaration contained counts for work and labour and for money lent, and the defendant pleaded non assumpsit, payment, the statute of limitations, and a set-off. The cause was taken down for trial at the assizes for the county of Worcester, when a verdict was taken for the plaintiff with 500*l.* damages, conditional upon the finding of an arbitrator, and under the order of nisi prius he was directed to make an award or certificate on the cause and all matters in difference, and "if he should find that the plaintiff was not entitled to recover any damages at all, then the above named conditional verdict was to be void, and instead thereof a verdict was to be entered for the defendant." The arbitrator found that nothing was due, and he directed a verdict to be entered generally for the defendant, and the ground on which this application was made was, that no evidence was offered on the pleas of payment or set-off, and that therefore the plaintiff was entitled to a verdict on those two issues.

R. V. Richards shewed cause, and contended that under the order of nisi prius the arbitrator could make his certificate in no other form than that which he had adopted. The terms of the order were, that if the plaintiff should not be entitled to any damages at all, then the conditional verdict should be void, and a verdict should be entered for the defendant. Then it was found that nothing was due to the plaintiff, and he was therefore entitled to no damages, and the certificate was right in directing a verdict for the defendant. The construction sought to be put on the order by the plaintiff was one which could only be arrived at by straining the words used; but the order was in fact a binding contract

upon the parties, and must be construed strictly. This case had occurred before the new rules, and was different from one where the order was drawn up in conformity with them. The Court had been in the habit of deciding such cases strictly, and they could not allow the award to be made in terms different from those used here. If the arbitrator had said, "I hereby declare that nothing is due from the defendant to the plaintiff, but I further award that there shall be a verdict for the defendant on the general issue, but for the plaintiff on the other issues," the Court could not allow it; because it would be inconsistent with the order of reference.

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Talfourd, Serjt., in support of the rule.—The true meaning of the order must be taken to be, that the arbitrator should find upon each of the issues as the evidence might justify. The terms of the submission were that "the cause should be referred," and that meant, each of the issues joined substantially. Suppose a case of trespass and that various rights were pleaded, any one of which would be sufficient to answer the action, it could not be held that because one plea was found for the defendant, the verdict must be entered for him on all the others, because that might have the effect of concluding many most important rights, affecting other individuals.

TINDAL, C. J.—The good sense and the law also in this case, are in favour of the party who makes this application. The cause was referred, and it appears that a general verdict was taken for the damages in the declaration. In order to shew that this was merely a formal entry, a general power is given to the arbitrator in reference to the whole cause. I think, then, that the whole cause is referred, and that the arbitrator is in the character of a jury, and may give a verdict on one issue or another as the evidence shall apply to all. Therefore, as here there

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was a plea of set-off, on which there was no evidence, the plaintiff is entitled to have a verdict on it, though the evidence on all the other pleas should be against him.

The rest of the Court concurred (a).

Rule absolute.

(a) *Bosanquet, J.*, was absent.

GRIFFIN v. TAYLOR.

Where an affidavit is sworn before a Commissioner of this Court in Vacation, it is "business depending in Court" within the meaning of the statute 11 Geo. 4, c. 70, s. 4, and is sufficient to confer a power on the Lord Chief Baron of the Exchequer to grant an order at chambers for the arrest of the defendant, the action being trover to recover bills of exchange.

THIS was an action of trover to recover certain bills of exchange, and an affidavit was sworn by the plaintiff before a commissioner of this Court in the country, during the last circuit, on which an application was made to Lord *Abinger*, C. B., at chambers, for an order for the arrest of the defendant. The order was granted, and, the defendant having been arrested, an application was made on his behalf to *Park, J.*, at chambers, that he should be discharged, on the ground that the learned Chief Baron had no jurisdiction in the cause to issue an order for his arrest. The order of *Park, J.*, was granted in vacation, and was drawn up to shew cause in Court.

Adams, Serjt., now shewed cause.—The question for consideration arose on the construction to be put upon the terms of the statute 11 Geo. 4, c. 70, s. 4. By that section it was enacted, "that any Judge of the said Court, to whatever Court he may belong, shall be and he is hereby accordingly authorised to sit in London and Middlesex for the trial of issues arising in any of the said Courts, and to transact such business at chambers or elsewhere depending in any of the said Courts, as relates to matters over which the said Courts have a common jurisdiction, and as may, according to the course and practice of the Courts,

be transacted by a single judge." On this the question arose as to whether there was such "business depending in Court," as would give the learned judge jurisdiction. This was the first case upon this particular section of the present act of Parliament, but decisions had been given upon similar provisions of other acts, and *Ex parte Smith* (a) was in point. There the question arose upon the 3 Geo. 4, c. 102, which was repealed by the statute 11 Geo. 4, c. 70, and by which the Judges were enabled to sit under the king's warrant, and to determine such matters as were "depending in the Court;" and in that case it was held, that an affidavit sworn during term, in support of an application for the re-admission of an attorney, was sufficient to bring the case before the Court within the statute. In the judgment given by the Court in that case too, it was said, that the act must be construed liberally, "for the dispatch of business and for the benefit of the public." In principle, no distinction could be drawn between that case and the present, and, in fact, the only difficulty which could arise was that which might be produced by the affidavit having been sworn before a commissioner instead of in Court. But the commissioner was an officer of the Court, and had the same jurisdiction in that particular matter as the Court itself. The power of the Lord Chief Baron would be undoubted if the affidavit had been sworn in the Court of Exchequer, and as the Judges had a concurrent jurisdiction given to them, in the case of all matters "depending in Court," it could not be contended that that power did not extend in this case to an affidavit sworn before a commissioner of the Court of Common Pleas. That this must be considered to be business done in Court was obvious, for in *Winter v. Payne* (b), it was held that drawing and engrossing an

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(a) 7 D. & Ry. 382.

(b) 6 T. R. 645.

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affidavit of debt in order to hold a party to bail, was business done in Court.

Whitehurst, in support of the order.—*Ex parte Smith* was no authority here, because it was decided under very peculiar circumstances, for it happened that the learned counsel who was instructed to make the motion mislaid the papers, and could not therefore apply to the Court. That case was also distinguishable from the present, because the affidavit was there actually sworn in Court, and that was stated to be the ground on which the decision rested, for it was said in the judgment, “An affidavit sworn in Court, or before one of its officers during the term, though not then made use of, seems to us sufficient to bring the subject-matter before the Court, so as to render it a matter ‘depending in Court,’ within the act of Parliament.” Then in *Winter v. Payne*, the question was one of an entirely different character. There the point was whether the business done was such as came within the operation of the statute 2 Geo. 2, c. 23, s. 23, so that it was necessary that a bill of costs should be delivered a month before action brought, but nothing was said about its being “business in Court.” An affidavit to hold to bail was no part of a suit; it was not a matter depending in Court, but was merely a preliminary proceeding: *Richards v. Stuart (a)*. So, all the authorities would shew that affidavits to hold to bail were matters quite distinct from the action. The question here was, whether at the time the application was made to the Lord Chief Baron, there was any business in Court, and it was submitted there was not. What had been done? The plaintiff, it was true, had made an affidavit, but it was within his power, if he chose, to destroy that affidavit and to abandon all proceedings. The first moment at which it

(a) 10 Bing, 322.

could be said that there was any "business in Court," was when the writ was issued, because it was then only that a suit could be said to be pending.

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TINDAL, C. J.—This case may be determined by a reference to the words of the section of the act of Parliament in question, which are so comprehensive, that it must be taken that they were intended to include the case now before us. They are, "Any Judge of the said Courts, to whatever Court he may belong, shall be and he is hereby accordingly authorised to sit in London and Middlesex for the trial of issues arising in any of the said Courts, and to transact such business at chambers or elsewhere, depending in any of the said Courts, as relates to matters over which the said Courts have a concurrent jurisdiction, and as may, according to the course and practice of the Court, be transacted by a single Judge." Now, the swearing an affidavit, whether before the Court itself, or a commissioner of the Court, is a "business depending in the Court," which is the expression used in the act as relating to matters in which the Courts have a common jurisdiction. Then each Court, it appears, would have jurisdiction to issue a writ, and, therefore, not being desirous to fritter away the intentions of the act, the object of which is evidently to make its provisions as comprehensive as possible, the best opinion is, that the learned Chief Baron had power to grant this writ.

PARK, J.—The question is, whether, in this case, there was "business depending in Court," to give my Lord *Abinger* jurisdiction. The act is a wholesome act, and it has now become necessary; but I own, that I have had very considerable doubt as to the word "depending." At the same time, however, I have come over to the opinion of the rest of the Court, that the moment the affidavit is made, with a view to set the penal process of the Court in motion, there is "business depending in Court."

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BOSANQUET, J.—I am of opinion that this case falls within the meaning of the act. Technically speaking, there is no doubt that the affidavit is not the commencement of the suit, and the words commonly employed in an act are, that where “a suit or action is depending in Court,” such and such things shall be done. Here, however, that language has been avoided, and I apprehend intentionally so, and the words which are used are, “such business at chambers or elsewhere, depending in any of the said Courts, as relates to matters over which the said Courts have a concurrent jurisdiction, and as may, according to the course and practice of the Court, be transacted by a single judge.” Now, there is no doubt that over actions of trover the judges have a common jurisdiction, and the affidavit prior to the issuing of the writ in trover is a matter relating to business, over which they have common jurisdiction; therefore, all these words agree certainly with all that has been done here. Then, is this “business depending in Court?” It appears to me that, although it is not technically the commencement of a suit, it is that which has for its object the commencement of a suit, and may be considered as “business depending in Court.”

COLTMAN, J., concurred.

Rule absolute.

DOE d. AGAR v. ROE.

Service, in
 ejectment, on
 the daughter of
 the tenant,
 coupled with
 the fact of the
 tenant's after-
 wards calling on
 the attorney of
 the lessor of the
 plaintiffs, and saying that he knows that the time is coming “when something must be done,” is
 sufficient ground for the Court to grant a rule for judgment against the casual ejector.

TALFOURD, Serjt., moved for judgment against the casual ejector. The affidavit on which he moved stated that the deponent had called at the residence of the tenant in possession of the premises in question, and had served the daughter of the tenant with a copy of the declaration

and notice, and explained their nature and purport to her. The tenant subsequently called at the office of the attorney of the lessor of the plaintiff, and proposed terms for the settlement of the action, saying that the time was approaching when something must be done. He went away promising that he would call again, but as the attorney had since received no communication from him, the lessor of the plaintiff now applied to the Court. It was submitted, that the conversation which had taken place was sufficient to shew that the service which had been effected on the daughter of the tenant had come to his knowledge, and that the papers had reached his hands.

TINDAL, C. J.—I think the expression that he knew the time was coming when “something must be done,” shewed that he was aware that something must be done by him.

Rule granted.

COX v. CANNON.

PRICE had obtained a rule, calling upon the plaintiff to shew cause why the warrant of attorney in this cause should not be given up to be cancelled for irregularity, and why the defendant should not be discharged out of the custody of the sheriff of Surrey, as to the judgment and execution on the said warrant. The ground upon which the rule had been obtained was, that the person by whom the warrant of attorney was attested on behalf of the defendant was not a certificated attorney, and besides, that he was a prisoner.

Peacock now shewed cause, and produced an affidavit, in which it was sworn that the defendant was a prisoner in custody at the time of the execution of the warrant of

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DOE
d.
AGAR
v.
ROE.

It is no ground for calling upon the Court to order a warrant of attorney to be delivered up to be cancelled, that it was not attested in the presence of a certificated attorney, the person who acted on the defendant's behalf having described himself as such, and having been produced by the defendant himself.

It is no objection that the attorney acting for the defendant is a prisoner.

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v.
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attorney, and that the deponent, the clerk to the plaintiff's attorney, took the warrant of attorney to him in prison to execute; that the defendant read the said warrant of attorney, and that the deponent then informed him that it was necessary that his signature should be attested by an attorney on his behalf; that the defendant sent for a person who, on his coming forward, described himself as an attorney, and who, on the warrant of attorney being executed, signed his name "William Haywood," and stated that he was the attorney for the defendant. The deponent stated also, that he was not informed, nor did he know that the said William Haywood was a prisoner, and an uncertificated attorney, nor did he tell the defendant that he would do to attest the warrant of attorney even although he was not certificated and a prisoner. The case of *Jeyes v. Booth* (a) was in point. There the attorney was produced by the defendant, and it was held that he must be looked upon as an attorney for the purposes of that case, and the Court refused to set aside the proceedings on the ground that he was not an attorney.

Price contra, submitted that the rule was peremptory upon the subject, and cited the case of *Verge v. Dodd* mentioned in Tidd's New Practice (b), where it was held in the Court of King's Bench that the presence and attestation of an attorney who had not taken out his certificate was insufficient.

TINDAL, C. J.—This case is not to be distinguished from *Jeyes v. Booth*, except that the party did not himself know that the person who acted as the attorney was not certificated. Before the defendant was in a position to make this motion, he should have cleared the way by

(a) 1 B. & P. 97.

(b) P. 279.

shewing that he was as ignorant as the other party. The fact of Haywood's being a prisoner is immaterial.

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Cox

v.

CANNON.

The rest of the Court concurred.

Rule discharged.

HOLMES and Another v. PINNEY.

ANDREWS, Serjt., shewed cause against a rule for striking out the name of one of the two plaintiffs on the record. It was an action brought by a banking company established under the 7 Geo. 4, c. 45, by the 9th section of which they were required to sue in the name of any one of their public officers. It was submitted, that the rule should have been to set aside the proceedings in the action on payment of the defendant's costs. [*Tindal*, C. J.—If the plaintiffs were to discontinue they would have to pay all costs certainly, but then the action must be recommenced, and there is a necessary further expense, which is quite useless.] The defendant might obtain some benefit by the discontinuance, and the Court ought not to suffer him to receive any injury in his rights. [*Tindal*, C. J.—It is not an uncommon occurrence to strike out the name of one of two plaintiffs, under such circumstances.] The question was, whether the Court would allow the parties, after the cause had proceeded so far by their own neglect, to exclude themselves from such consequences as would follow, if the Court should refuse to make this rule absolute.

Where, in an action by a banking company, the names of two plaintiffs are improperly put on the record, the 7 Geo. 4, c. 45, s. 9, requiring the suit to be carried on in the name of any one of the officers of the company, the Court will allow the record to be amended, the defendant's costs occasioned thereby being paid, and will not require the action to be discontinued and recommenced.

Wilde, Serjt., in support of the rule, cited *Baker v. Neaver* (a).

TINDAL, C. J.—I cannot think this is an unreasonable application. It is made to prevent unnecessary expense,

(a) Ante, Vol. 1, p. 616.

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HOLMES
v.
PINNEY.

and the defendant is put in precisely the same position as before, and all his costs attending the amendment are paid. The refusal to make this rule absolute would be only putting so much money in the hands of the attorney.

Rule absolute.

ROE v. COBHAM.

Where a sum of money has been offered to a plaintiff in satisfaction of his demand, which he declines to accept, but subsequently, on its being paid into Court with a plea of such payment, he takes it out, the Court will not interfere to give the defendant his costs, unless the case has previously been before the Master.

M*MARTIN* moved for a rule, calling on the plaintiff to shew cause why the Master should not tax the defendant his costs incurred in this cause since the service of the writ of summons. It appeared that the writ of summons was issued on the 20th of October, indorsed to recover a sum of 106*l.* 3*s.* 9*d.*, and on the 28th of the same month, the defendant took out a summons at chambers to stay proceedings, on payment by him of 81*l.* 14*s.* 9*d.*, together with costs, to be taxed by the master. The summons came on to be heard before *Alderson*, B., and was attended by the plaintiff, who took time to consider whether he would accept the terms which were offered. On the 31st he gave his answer, declining to accede to the proposition, and the defendant afterwards paid the money into court, and pleaded the payment. No further steps were taken in the cause until the 24th of February, and then the plaintiff took the money out of Court, in satisfaction of his demand. The course of practice was clearly laid down in numerous cases, and *James v. Raggett* (a) & *Hale v. Baker* (b) were both in point.

TINDAL, C. J.—Why not take the case before the officer? Let the plaintiff pursue his own judgment. He has got judgment in the cause, and let him go before the Master.

Rule refused.

(a) 2 B. & Ald. 776; S. C. 1 Chit. Rep. 471.

(b) Ante, Vol. 2, p. 126.

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DOE *d.* ——— *v.* ROE.

JARDINE moved for judgment against the casual ejector. The irregularity in the case was, that in the notice served on two of the tenants the Christian name of one of the other tenants was omitted.

The Court will grant a rule for judgment against the casual ejector, although in the notice served on two of the tenants, the Christian name of a third tenant is omitted.

TINDAL, C. J.—That is not material : take a rule.

Rule granted.

DOE *d.* SMITH *v.* ROE.

GRAY moved for judgment against the casual ejector. There were thirteen tenants in possession, on all of whom personal service had been effected. In the whole of the notices, however, two of the tenants were described merely as “Mrs. Martin” and “Mrs. Gough,” their Christian names being omitted. It was sworn that they were personally served, and that they were the tenants in possession, and besides, that their Christian names were not now known, and it was submitted, therefore, that the omission was not material.

Where there are thirteen tenants in possession, and they have all been personally served, it is no objection to a rule for judgment against the casual ejector being granted, that the Christian names of two of them have been omitted in all the notices.

TINDAL, C. J.—You may take a rule. There has already been a similar case before the Court.

Rule granted.

MAYHEW *v.* HOADLEY.

ARNOLD moved for a rule for an attachment against the sheriff, for not bringing in the body. The writ of

the copy served on him he is directed to put in bail in the Exchequer of Pleas, instead of in the Common Pleas, his omission to put in bail in the Common Pleas does not afford a sufficient ground to induce the Court to grant a rule for an attachment against the sheriff for not bringing in the body.

Where the defendant is arrested on a *capias*, and in

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v.
HOADLEY.

capias was issued in the month of March, and the defendant was arrested and a copy served on him in pursuance of the directions of the statute, in which, however, by a mistake of the clerk, he was directed to put in bail "in the Exchequer of Pleas," instead of in this Court. The writ was tested in this Court, and the action was in this Court, and it was submitted that, as no bail had been put in, in this Court, and as the defendant must have been aware that it was an error in the copy of the writ to require bail in the Exchequer of Pleas, this rule must be granted.

PARK, J.—I doubt very much whether it is a demand of bail. I do not see that it will do.

Rule refused.

NEWTON and WIFE v. HARLAND and Others.

A plaintiff who has been called to the bar since the commencement of an action, cannot claim his privilege in order to procure the venue in the action to be brought back from York to Middlesex.

The privilege cannot be granted to a person joined with his wife in the action, whether they be plaintiffs or defendants.

W. H. WATSON moved for a rule, calling on the defendant to shew cause why the venue in this action should not be brought back to the county of Middlesex, where it had been originally laid, but from which county it had been removed by the defendants to York. The action was commenced in Easter Term, 1837, and the ground on which this motion was made was that of the privilege of Mr. Newton, who was a barrister, and was now pursuing the practice of the law. It was submitted that the privilege of a barrister was equal to that of an attorney, but in the present case there was a difficulty, in Mr. Newton not having been called to the bar until after the commencement of the action. The principle on which the privilege was granted, however, being, that the clients of the privileged person should not suffer by his absence; this was immaterial.

TINDAL, C. J.—The plaintiff has no right, by his voluntary act, in being called to the bar, to inflict an inconvenience on the defendant.

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NEWTON
v.
HARLAND.

W. H. Watson said, that there was also another difficulty, in Mr. Newton being joined with his wife in the action. The moving party in the suit, however, was the husband, and it was his attention which was peculiarly expected to be paid to the case. If the reason of the principle besides, were good, that the presence of the privileged person was required in Westminster Hall, for the benefit of his clients, it would apply to this case as well as any other.

TINDAL, C. J.—I cannot help saying, that as far as the clients of the plaintiff are concerned, but little injury will be done, for the Courts in Westminster Hall and the Courts at York do not sit at the same time.

W. H. Watson.—In Tidd's Practice (a) there were some cases cited on the point, but they were all cases of defendants who claimed the privilege, and the reason why husband and wife could not then be joined, was that the attachment of privilege was in existence. The attachment did not, however, now exist, and the case it was submitted was altered.

TINDAL, C. J.—It seems to me that the case stands on the same ground, whether the party claiming privilege is defendant or plaintiff; if a person is joined with his wife as defendant he cannot enjoy the privilege, and the same rule must apply here.

Rule refused.

(a) Ninth edit., p. 80.

1838.

SHARPLIN *v.* HUNTER.

A defendant having been arrested in his way to Court to deliver himself up into the hands of the Court of Queen's Bench to receive judgment on a conviction for conspiracy, the Court will only grant a rule nisi for his discharge on his own affidavit.

The facts being subsequently admitted by the plaintiff, the defendant will be discharged as to that case, but if any detainers are lodged against him, he will not be discharged as to them unless notice of the motion has been given to the parties concerned.

R. V. RICHARDS moved for a rule for the discharge of the defendant out of the custody of the sheriff of Middlesex, in this action. It was sworn by the defendant, that he had been indicted for a conspiracy with some other persons, and was convicted, and a rule was obtained for judgment against him, or in the alternative for a motion for a new trial, and he was proceeding in a coach to deliver himself up into the hands of the Court of Queen's Bench, having reason to believe that as the rule was in the paper, it would come on for discussion on that day, when he was arrested in the present action by W. Thompson, an officer of the sheriff, and by him conveyed to a lock-up-house in Chancery-lane, where he was still detained. It was submitted that the rule should be absolute in the first instance.

TINDAL, C. J.—The statement is made by the prisoner himself, and we cannot discharge him without some further inquiry. You can only have a rule to shew cause.

On a subsequent day.

Legh appeared for the plaintiff in the action, but no one appeared for the sheriff. The facts stated by the defendant were not disputed.

R. V. Richards submitted that the rule must be absolute as to all detainers lodged subsequently to the defendant's arrest. The first imprisonment was illegal, and any continuation of it would be illegal also.

TINDAL, C. J.—Suppose a person innocently detained him, it does not necessarily follow that that detainer is

illegal. The sheriff will not let him go from any detainers there may be. He will discharge him from this case; but if there are any other persons who have lodged detainers against him, and whose interests are therefore concerned, at all events he cannot be discharged as to them, unless you have given them notice.

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 v.
 HUNTER.

Rule accordingly.

HUNTLEY v. BULWER and Others.

J. BAYLEY moved for a rule, calling on the plaintiff or his attorney to shew cause why all proceedings in this action should not be stayed until the plaintiff had given security for costs. It appeared that the plaintiff had resided at Billericay, in Essex, up to the month of October, 1836, and that he had then gone to St. Omer, in France, in insolvent circumstances. 'Three days' notice of the defendants' intention to make the present motion had been served on the plaintiff's attorney, and it was submitted that this was equivalent to a demand of the security required and a refusal to give it.

Three days' notice to the plaintiff's attorney of an intention to move the Court that the plaintiff give security for costs, is not equivalent to a demand and refusal, and the Court will not grant a rule upon such a notice.

TINDAL, C. J.—You have not demanded the security, and it may have forced the plaintiff to take a step. By the notice you only tell him something.

PARK, J.—You ought to apply to him for security. How far have the pleadings gone?

J. Bayley.—The defendant did not state that, nor was it for him to do so. That was clearly stated in a case of *Jones v. Jones*, referred to in Tidd's New Practice (a).

PARK, J.—It may be that the action has proceeded too far.

Rule refused.

(a) P. 270.

1833.

HOCKEN v. BROWN and Another.

A surety for the payment of an annuity by a party, is not released from his liability by the grantor of the annuity becoming insolvent, and being discharged under the statute 7 Geo. 4, c. 57, and to an action of trespass for seizing and taking the plaintiff's goods, the defendant having pleaded a justification under a writ of *fi. fa.* issued upon a judgment entered up on a warrant of attorney given by the plaintiff jointly with the grantor, for the payment of the annuity, a replication alleging the grantor to have been discharged under the Insolvent Debtors' Act, and that thereby "the plaintiff was discharged from his liability to the defendants":—*Held*, bad on demurrer.

THIS was an action of trespass for seizing and taking the goods of the plaintiff, under colour of a writ of *fi. fa.* The defendant pleaded in the usual form, justifying the seizure under the writ, which had been issued on a judgment against the plaintiff and one C. V. G. The plaintiff replied, stating an indenture, dated the 16th of February, 1831, made between C. V. G., of the first part; the defendants, of the second part; and one W. E., the trustee of the defendants, of the third part, by which an annuity of 135*l.* was granted by the said C. V. G. to the defendants, to be paid during the lives of the defendants, the payment of which was secured by a joint and several warrant of attorney, executed by the said C. V. G. and the plaintiff as his surety, and it was alleged that judgment was entered up on the said warrant of attorney on the 25th of February, 1835, which it was agreed should be considered as a collateral security for the due payment of the annuity, and that on that judgment the *fi. fa.* in the plea mentioned was sued out. That subsequently a certain sum of money, to wit, the sum of 33*l.*, being the amount of a quarterly payment upon the annuity, became due and payable to the defendants, to wit, on the 14th of June, 1836, for the payment of which sum the plaintiff was liable as surety. But that before the said sum of 33*l.* so as aforesaid became due and payable, to wit, on the 26th of September, 1835, the said C. V. G. was a prisoner for debt, confined in the Fleet prison, at the suit of one Richardson and others, and that he applied by petition to the Court for the Relief of Insolvent Debtors to be discharged, and that on the said petition coming on to be heard and examined by the said Court he was discharged, and was held entitled to the benefit of the act, and that by the force of the said discharge the plaintiff was released from his liability to the

payment of the money to the defendants in respect of the said annuity. Demurrer, that although the plaintiff had admitted the execution of a warrant of attorney, yet he had in no way by his replication avoided the effect of the said warrant.

Joinder.

Channell, in support of the demurrer. The effect of the replication was, that the plaintiff, being the surety and liable on the judgment jointly entered up against him and the grantor of the annuity, was discharged, because the grantor was released under the Insolvent Debtors' Act. It was submitted, however, that this proposition could not be maintained, and although, where a party by his own act released one of two judgment debtors or principals, that act would have the effect of discharging the other judgment debtor or the surety, yet that rule would not apply where the party was a joint contractor, and the principal was discharged under an act of Parliament, unless the statute distinctly pointed out that he also should be discharged. No such provision was contained in the Insolvent Debtors' Act (7 Geo. 4, c. 57). *Cowley v. Bussell* (a) was a case where it was held that, although the grantor of an annuity, when discharged under the Insolvent Act (51 Geo. 3, c. 125), was discharged both as to his person and property from all future payments of the annuity, yet his surety or specific securities were not discharged by the act, and the judgment of *Mansfield*, C. J. was decisive. *Page v. Bussell* (b) was to the same effect, and decided also that the grantor of the annuity was liable over to the surety. *Powell v. Eason* (c) was also in point.

Hoggins, in support of the replication. The real question was the liability of the surety, and this was the

(a) 4 Taun. 460.

(b) 2 M. & Sel. 551.

(c) 8 Bing. 23.

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first case of a surety for an annuity since the act of 7 Geo. 4, c. 57. The cases which had been cited did not apply; and it could never have been intended by the legislature to render the principal liable over to the surety, because if it were so, it would deprive him of the benefit intended to be conferred upon him by the act of Parliament. The 51st section of the act provided for the discharge of the debtor from all liability in respect of an annuity; and it must have been intended that the surety also should be discharged. It might have been different if the plaintiff were a party to the annuity deed; but he only executed the warrant of attorney as the surety. The object of the act was to discharge the grantor at all events; and it must be presumed that it was intended that the statute should have another clause, by which the surety also should be directed to be discharged. The words of the 51st section were imperative, that the annuity creditor should prove for the whole value of the annuity, and the principle was, that the surety also should be discharged.

Channell, in reply, was stopped.

TINDAL, C. J.—It appears to me that this case may be decided by reference to the concluding words of the 51st section of the act. That section authorizes the creditor on an annuity deed to establish his claim for the present value of the annuity, but it does not appear on this record that he has so done, and his reason for omitting to do so will not be a question here. The clause expressly provides, after it has authorized the annuity creditor so to proceed for the value of his claim, “and such creditor or creditors shall be entitled, in respect of such value, to the benefit of all provisions made for creditors by this act, without prejudice nevertheless to the respective securities of such creditor or creditors, excepting as respects such prisoner’s discharge under this act.” Now, how does the present plaintiff stand? The principal having granted an an-

nuity, the plaintiff gives as a security his own warrant of attorney, and this clause expressly excepts from its provisions "the respective securities of such creditors, excepting as respects such prisoner's discharge." It appears to me, then, that this case comes within this exception; and the grantees have a right to go to the full extent against any securities they may hold. The only security held here is the warrant of attorney given by the plaintiff, and the only question is, whether it comes within this last exception. It seems to me, that the exception is limited only to preventing the party from taking any step which shall prevent the prisoner's discharge under this act. But the party here has been already discharged. Then it is said that the surety may bring his action against the original grantor of the annuity. It may be so; but we cannot supply the machinery which the legislature has not given.

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PARK, J.—I am of the same opinion. In the case of *Freeman v. Burgess* (a), the Court refused to liberate on motion a discharged insolvent, who had been arrested by his surety for the arrears of an annuity accruing subsequently to the insolvent's discharge, and paid by the surety. That may not be precisely similar to this case; but the Court then went very fully into the grounds of their decision. If the statute now under consideration was intended to bear the meaning sought to be put upon it, it is most singular that it was not rendered quite clear, which might have been done by the introduction of two or three words. Besides, if the plaintiff's argument were right, the creditor would be deprived of the very advantage which he intended to secure, in procuring a person to become surety for the principal.

BOSANQUET, J.—The annuity creditor here has acquired by the act of the plaintiff, a distinct right to sue him for

(a) 4 Bing. 416.

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the annuity, in case it should fail by reason of non-payment by the grantor, and it appears to me that nothing but the most express words in the act can deprive him of that right which he has acquired. The annuity creditor has done nothing himself to release the demand, and we have only to put a construction upon the act of the legislature. It is observable, that the very year before this act was passed, there was another statute came into operation (6 Geo. 4, c. 16,) relating to bankrupts, in which specific provisions were contained, in reference to the surety, for it is provided (a), that if the surety shall pay the amount of the valuation he shall be discharged, but if not, he shall be liable to the annuity creditor. Then, the very year after, follows this act, in which there is no provision as to the discharge of the surety, but there is an enactment, that the annuity creditor shall be admissible to prove the value of the annuity under the act. We may take those provisions, therefore, to have been purposely omitted. The question as to the right of the surety against the insolvent does not arise here.

COLTMAN, J.—If we might speculate upon this act of Parliament, I think there are some grounds for supposing that the framers of its provisions intended to go further than they have done; but we are not at liberty to do so, but must consider the act as it stands. I am not insensible to the weight of Mr. *Hoggins's* argument, that by a circuitous mode, the benefit which, it appears, is intended to be conferred on the insolvent, may be in some degree impaired, if not lost; but at the same time there would be considerable inconvenience if we were to construe this statute in any other way than that which has been adopted, because it is impossible to conceive that it

(a) Sect. 55.

was the intention of the Legislature to place the surety of an insolvent in a position so much better than that in which it had already placed the surety of a bankrupt. The argument here is, however, that it was intended to discharge the surety, without his paying any thing, but one would not come to that decision, unless the absolute words of the act rendered such a conclusion necessary. It seems to me, that the most rational construction to be put upon the enactment is, that it leaves the case of the surety untouched, and as it stood at common law.

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Judgment for the defendants.

MARTIN v. SMITH.

THIS was an action of assumpsit, and the declaration contained counts for money had and received, and on an account stated; the defendant pleaded non assumpsit. The cause was tried before *Coltman, J.*, and a verdict was entered for the plaintiff, with 20*l.* damages, leave being reserved to the defendant to move to enter a non-suit.

In an action of assumpsit for money had and received to the plaintiff's use, the defendant cannot, under a plea of the general issue, give in evidence that the money was received in respect of an illegal wager.

Humfrey accordingly on a former day obtained a rule nisi. It appeared that Mr. O. had entered into an arrangement, by which he agreed to trot his horse against the horse of another individual, Mr. T., for 1000*l.*, along the road for a given distance. The former completed the amount of his stakes, by selling them in one pound shares, and of these the defendant purchased fifty, and afterwards sold twenty of them to the plaintiff. The horse belonging to Mr. O. having been successful in the race, the defendant received the whole amount due upon the fifty shares, and it was proved that he had previously promised to pay the plaintiff so soon as he had received the

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money. He never, however, paid, and the present action was in consequence brought. It was contended at the trial, on the part of the defendant, that the wager was an illegal one, and that the plaintiff ought not to recover; but it was submitted *contra*, that, as the receipt of the money by the defendant had been proved, this action was maintainable; and that the objection of the defendant could not be successful in its present form, for that since the new rules it should have been pleaded specially.

Martin now shewed cause, and admitted that the wager must be considered to be illegal, *Whaley v. Pajot* (a). This action, however, was independent of the race, and was founded on the receipt of the money by the defendant. In *Tenant v. Elliott* (b), it was held, that one party having received money to the use of another, on an illegal contract between the latter and a third person, he should not be permitted to set off the illegality of the contract as a defence to an action for money had and received. *Farmer v. Russell* (c), was also in point. Unless the plaintiff in this action should succeed, the defendant might set every one else at defiance and keep the money, for Mr. O. could never recover it from him. *Vaughan v. Whitcomb* (d), was also cited. But the defence ought to have been specially pleaded. Non assumpsit put in issue matters of fact only, and all matters in confession and avoidance must be pleaded specially. R. G. H. T. 4W.4, (e). Here, the fact was the receipt of the money, and that was distinctly proved.

Humfrey in support of the rule.—By non assumpsit the defendant put in issue those “facts from which a promise could be implied by law.” The plea here was not

(a) 2 B. & P. 51.

(b) 1 Bos. & P. 3.

(c) *Id.* 296.

(d) 2 N. R. 413.

(e) *Ante*, Vol. 2, p. 322.

one of confession and avoidance at all, but it put in issue, as a matter of denial, those facts which in law would be an answer to the case. He denied that the money was by law received to the plaintiff's use, and if he had put on record a special plea, it might have been demurred to, as amounting to the general issue, *Solly v. Neish* (a). Supposing an action to have been brought by a plaintiff, a married woman, for money received to her use, it could never be contended that it was necessary to plead the marriage of the plaintiff; the denial of a contract was a denial of it in law. He referred to *Potts v. Sparrow* (b).

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TINDAL, C. J.—On the first point, whether money had and received is maintainable in this case, we are clearly of opinion, that as the plaintiff cannot make out his case without unravelling the whole transaction, and going into proof of the contract, the illegality of the contract would furnish an answer to it in this form. As to the second objection, that this defence should have been specially pleaded, I incline to the opinion that, on the best construction to be put on these new rules, the objection becomes a question of illegality of consideration, and should have been specially pleaded. The general rule is laid down in the first part of the rule referred to, that “the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.” Then the broad distinction on this general rule is between actions of assumpsit, brought on express contracts, and those brought on contracts only implied by law. Non assumpsit in the first case would put in issue the fact of the contract, while in the second case it would put in issue many matters of fact and of law, and when you look at the examples which are given by

(a) Ante, Vol. 4, p. 248.

(b) Ante, Vol. 3, p. 630.

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way of explanation to the rule, after dealing with the first cases of express contracts, they come to those of implied contract, and it is said, "In an action of indebitatus assumpsit for goods sold and delivered, the plea of non assumpsit will operate as a denial of the sale and delivery in point of fact." Now, let us pause there for a little, and suppose a case of an action for goods sold and delivered, where a plea of the general issue was on the record, and it was proved that the plaintiff had been active in delivering the goods, for the purpose of their being smuggled; it can hardly be said that the defendant could avail himself of such a defence, if he had not brought it to the mind of the party by pleading it. Then, let us go a little further: "In the like action for money had and received, it will operate as a denial, both of the receipt of the money, and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff." It is no where said that it will have a double effect, and all that it says is, that it will operate as a "denial both of the receipt of the money, and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff." Then we must couple this with what appears in the third rule. First, the rule says how much non assumpsit puts in issue; and then we come to the third rule, which provides that "in every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded: ex. gr., infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law," &c. Now, here the defence is, that the money sought to be recovered was received as the result of an illegal wager on a horse race. I think, therefore, that this is a matter of defence implying illegality upon a statute, and that it should have been pleaded. The case which has

been well put in argument, is one which is distinct from this.

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PARK, J.,—Concurred.

BOSANQUET, J.—I am of opinion, that advantage cannot be taken of the defence here set up, under the plea of non assumpsit. The substance of the defence is, that the contract is void in law, and that the money therefore was not received to the plaintiff's use. The rules with respect to pleading in actions of assumpsit have been so clearly stated by the Lord Chief Justice, that I need not say much on them. In the first instance, however, I may say, that it was the great object of all these rules, that where the plaintiff came down to trial, he should know well what he had to meet, and therefore the defence intended to be set up against him ought to appear on the face of the record. Now, this object of the rule applies here, because the facts proved are *primâ facie* sufficient to raise a presumption in law, that the money was received to the use of the plaintiff. But then it is said, that there are certain statutes which make the transaction illegal, and therefore that no presumption in law can be entertained that the defendant was to pay the money to the plaintiff, and that there is no consideration for paying over the money. That want of consideration, however, I think must be pleaded.

COLTMAN, J.—When this case was before me at the trial, looking at the first rule, it appeared to me to furnish some ground for the argument of Mr. *Humfrey*. On contrasting that rule with the third rule, however, I thought that the two must be taken together, and I adhere to that opinion.

Rule discharged.

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NEWTON and WIFE v. HARLAND and Others.

In an action for an illegal seizure and sale of the plaintiff's goods under a warrant of distress, the declaration contained nine counts, two of which went to the whole value of the property, while the remainder went to the injury to the goods and the improper dealing with them. A verdict being entered for the plaintiffs on the first two counts, and for the defendants on the rest:—*Held*, that the defendants might set off the costs of those counts against the costs of the issues found for the plaintiffs.

NEWTON moved for a rule, calling on the defendants to shew cause why they should not pay to the plaintiffs the sum of 35*l.* deducted by the Master, as the defendants' costs, from the amount paid on the taxation of the plaintiffs' costs in the action. The cause was tried at the York Assizes, before *Parke*, B., in July, 1837, and there was a general verdict for the plaintiffs, damages 45*l.* It was an action for the illegal seizure and sale of the plaintiffs' goods, under a distress for rent, and the declaration contained nine counts, on each of which there were distinct issues raised, the defendants pleading the general issue to the whole of the declaration, and several special pleas. The verdict was entered generally for the plaintiffs by the associate, but before the parties proceeded to tax the costs, the defendants took out a summons before *Parke*, B., on the ground that it was improperly entered, and an order was then made, directing a verdict to be entered for the plaintiffs, on seven of the issues, leaving the damages as they were on the other two issues, which went to the whole value of the property, the other issues being on the injuring and illegally dealing with the property, which became immaterial, when the plaintiffs recovered for the whole value. The Master, on taxing the costs, set off the costs on the issues found for the defendants against those of the plaintiffs. It was submitted, however, that this was an erroneous view of the law and of the case. The counts which were found for the plaintiffs went to the whole value of the property, and the issues, on which the verdict was entered for the defendants, were immaterial to the general subject-matter of the action. It was clear that the plaintiffs were not entitled to costs on those issues entered for the defendants; but it was equally clear that the defendants were not entitled to set off the costs on those

issues found for them, against those which the plaintiffs had a right to claim on the issues on which they had obtained a verdict. In *Goodburne v. Bowman* (a), it was held, that where immaterial issues were found for the defendant, and judgment was afterwards entered for the plaintiff, non obstante veredicto, neither party was entitled to the costs of the immaterial issues. The plaintiffs clearly recovered on the material issues, for the verdict gave them the whole value of the property seized, and they were necessarily precluded from recovering on those counts which referred only to the injuring and dealing with the property.

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TINDAL, C. J.—I do not see that you bring yourself within the rule of H. T. 2 W. 4, s. 71. The provisions of that rule are, that “no costs shall be allowed on taxation to a plaintiff, on any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff’s costs.”

Newton.—That rule did not apply to cases where the issues found for the defendant were immaterial.

TINDAL, C. J.—It is very hard that the defendants should be brought into Court on eight or nine counts, when you might have brought your action in a shorter form, and therefore the hardship is not on you alone. In the case you cite, it is admitted that the plaintiff had his right of action, and the application was made within the first four days of the term after the trial. You are now too late.

PARK, J.—You should have come here four days after 11th November, when Mr. Baron *Parke* made the order.

(a) 9 Bing. 667.

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Newton.—No mischief had arisen until after the costs were taxed, which was not until the next vacation. During the whole of Hilary Term besides, it was sworn that the plaintiff was confined by illness at Cheltenham, which prevented his giving proper instructions in the case.

TINDAL, C. J.—I think, on the proper construction, to be put on this rule, you do not bring yourself within it at all. It is intended, that where the plaintiff puts more counts in his declaration than are necessary, he should pay the costs of those which are not proved.

Rule refused.

REGULÆ GENERALES.

—◆—

TRINITY TERM, 1st VICTORIA.

IT IS ORDERED that in future, in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only.

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DENMAN.	J. B. BOSANQUET.
N. C. TINDAL.	E. H. ALDERSON.
ABINGER.	J. PATTESON.
J. A. PARK.	J. GURNEY.
J. LITTLEDALE.	J. WILLIAMS.
J. VAUGHAN.	J. T. COLERIDGE.
J. PARKE.	T. COLTMAN.
W. BOLLAND.	

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TRINITY TERM, 1st VICTORIA.

WHEREAS, it is expedient that certain of the rules and regulations made in Hilary Term, in the 4th year of his late Majesty King William the Fourth, pursuant to the statute of the 3rd and 4th William 4th, c. 42, s. 1, should be amended, and some further rules and regulations made pursuant to the same statute ;

IT IS THEREFORE ORDERED, that, from and after the first day of Michaelmas Term next inclusive, unless parliament shall in the mean time otherwise enact, the following rules and regulations made pursuant to the said statute shall be in force.

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1st. IT IS ORDERED, that the 17th and 19th of the General Rules and Regulations made pursuant to the statute 3rd and 4th William 4th, c. 42, s. 1, be repealed; and that in the place thereof, the two following amended rules be substituted, viz:—

For the 17th Rule.

Payment of
money into
court.

When money is paid into Court, such payment shall be pleaded in all cases, and as near as may be in the following form mutatis mutandis.

Form of.

“C. D. } The day of the
 ats. } defendant, by his attorney,”
 A. B. } (or “in person, &c.) says,” (or, in case it be
pleaded as to part only add “as to £ being part of
the sum in the declaration” or “count mentioned,” or “as
to the residue of the sum of £) that the plaintiff
ought not further to maintain his action, because the de-
fendant now brings into Court the sum of £ ready to
be paid to the plaintiff. And, that the defendant further
says, that the plaintiff has not sustained damages,” (or in
actions of debt, “that he never was indebted to the plain-
tiff,) to a greater amount than the said sum &c., in re-
spect of the cause of action in the declaration mentioned,”
(or, “in the introductory part of this plea mentioned,) and
this he is ready to verify: wherefore he prays judgment, if
the plaintiff ought further to maintain his action thereof.”

For the 19th Rule.

Proceedings by
plaintiff after
payment of
money into
court.

The plaintiff, after delivery of a plea of payment of money into Court, shall be at liberty to reply to the same by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty in that case to tax his costs of suit, and in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of

suit so taxed; or the plaintiff may reply, "that he sustained damages (or, "that the defendant was and is indebted to him," as the case may be) to a greater amount than the said sum;" and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

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IT IS ORDERED, That in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of any act of Parliament, he shall insert in the margin of such plea the words "by statute," otherwise such plea shall be taken not to have been pleaded by virtue of any act of Parliament, and such memorandum shall be inserted in the margin of the issue, and of the Nisi Prius record.

General issue by statute.

In any case in which the plaintiff (in order to avoid the expence of a plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money.

Payment credited in particular of demand need not be pleaded.

But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums.

Rule not to apply to claim of balance.

Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt; but shall be pleaded in bar.

Payment in reduction of damages or debt not to be allowed.

DENMAN.	J. B. BOSANQUET.
N. C. TINDAL.	E. H. ALDERSON.
ABINGER.	J. PATTESON.
J. A. PARK.	J. GURNEY.
J. LITTLEDALE.	J. WILLIAMS.
J. VAUGHAN.	J. T. COLERIDGE.
J. PARKE.	T. COLTMAN.
W. BOLLAND.	

COURT OF EXCHEQUER.

Trinity Term,

IN THE FIRST YEAR OF THE REIGN OF VICTORIA.

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RANDALL v. RIGBY.

By indenture certain lands were granted, bargained, sold, &c. to R. H. and the defendant, to the use and intent that the plaintiff should receive out of the land a clear yearly rent of 63*l.*, and the said R. H. and the defendant covenanted that they would well and truly pay the said rent to the plaintiff:—
Held, that debt could not be maintained for arrears of the annuity, but that covenant was the proper remedy.

DEBT.—The declaration stated that heretofore, to wit, on the 17th of October, 1837, in and by a certain indenture then made, between the plaintiff of the first part, H. Brookes of the second part, and R. Hollis and the defendant, of the third part (profert), certain lands and premises were granted, bargained, sold, aliened, enfeoffed, and confirmed unto the said R. Hollis and the defendant, their heirs and assigns, to hold the same unto the said R. Hollis and the defendant, and their heirs, to the use, intent, and purpose that the plaintiff, his heirs and assigns for ever, should and might, out of the said land and the dwelling-houses, and other buildings erected thereupon, with the appurtenances, receive and take one clear yearly rent or sum of 63*l.* of lawful money of Great Britain, to be payable half-yearly, free from all deductions whatsoever, and to the further uses, intents, and purposes in the said indenture mentioned. And the said defendant did by the said indenture, for himself, and for his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the plaintiff, his heirs and assigns, that they, the said R. Hollis and the defendant, their heirs, executors, administrators, and assigns, or some or one of them, should or would for ever thereafter well and truly pay or cause to be paid unto the plaintiff, his heirs and assigns, the said yearly rent of 63*l.*, by the said indenture

limited in use to him and them on the days and times thereinbefore appointed for payment thereof, and hereinbefore mentioned, without any deduction or abatement whatsoever. And the plaintiff saith, that after the making of the said indenture, to wit, on the 25th of March, 1838, which day elapsed before the commencement of this suit, a large sum of the yearly sum or rent aforesaid, to wit, 31*l.* 10*s.*, became due to the plaintiff according to the said covenant, for one half of a year ending on the day and year last aforesaid, and then last elapsed. And the plaintiff further saith, that the said R. Hollis was then, and thence to the commencement of this suit, alive. Breach—that neither R. Hollis nor the defendant paid the said sum, but therein made default, contrary to the said covenant, whereby an action hath accrued to demand the sum of 31*l.* 10*s.*

General demurrer and joinder.

Wightman, in support of the demurrer.—The question in this case is, whether debt will lie for the arrears of an annuity issuing out of land. *Kelly v. Clubbe* (a) decided that debt could not be maintained during the life of the annuitant for the arrears of an annuity for life issuing out of land, notwithstanding the declaration avoided stating that the grantor had a freehold in the lands, and alleged that he received the rents to the use of the grantee. In that case as well as the present there was a covenant by the grantor for the payment of the annuity. The point was more fully considered in *Webb v. Jiggs* (b); there it was decided that debt would not lie at common law, nor by stat. 8 Ann. c. 14, for the arrears of an annuity or yearly rent devised payable out of lands to A. during the life of B., to whom the lands were devised for life, so long as the estate of freehold continued. Here, it arises by grant, and

(a) 3 B. & B. 130.

(b) 4 M. & Sel. 113.

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there is a covenant to secure its payment. The same principle will apply to both cases. The covenant is a collateral security, but the annuity issues out of the land: it is conceded that the defendant may be liable upon his covenant, but he is not in the present form of action.

Crompton, contra.—This is a covenant to pay a sum in gross, in which case debt will lie. *Ingledew v. Cripps* (a). [*Parke*, B.—It is laid down that debt will not lie upon a conditional covenant, that if C. do not pay B. 10*l.*, then A. will pay it—*Wentworth's Office of Executors*, 250.] *Webb v. Jiggs* arose upon a devise, and the Court proceeded upon the ground of want of privity. [*Parke*, B.—The Court decided that case upon the ground, that during the continuance of the freehold an action would not lie; but the only remedy was a real remedy.] It is not contended that debt will lie where there is a mere taking of the profits, but here there is a collateral covenant in gross, which would not go with the land, or pass with the debt. In *Kelly v. Clubbe*, it must be assumed that there was no covenant. This case resembles *Milnes v. Branch* (b); there J. B., being seised in fee, conveyed to defendant and G. J., their heirs and assigns, to the use that J. B., his heirs and assigns might have and take to his use, a rent certain to be issuing out of the premises, and subject to the said rent to the use of defendant, his heirs and assigns, and defendant covenanted with J. B., his heirs and assigns, to pay to him, his heirs and assigns, the said rent, and to build within one year, one or more messuages on the premises, for better securing the said rent, and J. B. within one year demised the said rent to the plaintiffs for one thousand years; and it was held that covenant would not lie for the plaintiffs, for non-payment of the rent, or for not building the messuages, for the covenant

(a) 2 Lord Raym. 814.

(b) 5 M. & Sel. 411.

was personal to J. B. *Cook v. Herle* (a) shews that this covenant could not be transferred. [*Parke, B.*—How do you distinguish this from the case of a lease with a covenant, by the lessee, his executors, administrators, and assigns, to pay the rent, the lessee assigns, and the assignee enters and is accepted as tenant by the lessor? in case of non-payment of the rent, the lessor may maintain debt against the assignee, but can only bring covenant against the lessee, because the privity of estate is determined, *Mills v. Auriol* (b).] Those are questions as to how far debt will lie upon a contract arising from the privity of estate; here, the covenant in its inception is the same as if it were between A. B., and C. D. to pay a certain sum.

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Wightman, in reply.—There is no doubt this is a covenant in gross; but the question is, whether it is a covenant collateral; because if so, there is no such duty between the defendant and the plaintiff as will enable the latter to maintain debt. *Cook v. Herle* is an express authority that this is a collateral covenant. The primary duty is not that the defendant shall pay it; in the first instance it is to be taken out of the land; if it be not paid from the land, then the defendant is looked to. This then sounds in damages, and covenant is the only remedy.

LORD ABINGER, C. B.—The question is, whether the defendant is liable in this form of action. It is an action on collateral covenant, by which the defendant and another undertake to pay an annuity secured on land. The case then resembles that of a lessee who has assigned his lease; and in *Mills v. Auriol*, the effect of such assignment was considered. There, *Wilson, J.*, says: "An action of covenant remains after the estate is gone; but generally speaking, when the land is gone, the action of debt

(a) 2 Mod. 138. (b) 1 H. Blac. 433.

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is also gone, debt being maintainable because the land is debtor: covenant is founded on a privity collateral to the land." Then the relation of the defendant to the plaintiff is the same as that of the original lessee to the lessor, in the cases cited.

PARKE, B.—I am of the same opinion. No doubt this is a collateral covenant in gross, as it does not run with the land; it is also collateral in the sense insisted upon by Mr. *Wightman*, as it is not a covenant to perform any duty accruing from the defendant to the plaintiff, but to pay an annuity secured on land. The cases shew, that under such circumstances debt cannot be maintained. This case ranges itself within the principle of *Mills v. Auriol*, which has been referred to, and covenant is the only remedy.

BOLLAND, and ALDERSON, B.s, concurred.

Judgment for the defendant.

AIREY v. FEARNSIDES.

Where a declaration contains a bad and a good count, and there is a general verdict for the plaintiff, the Court will not arrest the judgment, but will award a venire de novo.

ASSUMPSIT.—The first count stated, that the defendant made his promissory note in writing, and thereby promised to pay to the plaintiff or order, 13*l.* for value received, with interest, "and all fines according to rule." There was also a count on an account stated. A verdict having been found for the plaintiff—

W. H. Watson obtained a rule to arrest the judgment, on the ground that the instrument set out in the first count was not a promissory note, but an agreement, and should have been declared upon as such.

Wightman shewed cause.—The words “and all fines according to rule,” have no intelligible meaning, and may be rejected as surplusage. It would be impossible to declare upon these words, as upon a separate contract. This case is distinguishable from *Smith v. Nightingale* (a); there, the defendant promised to pay 60*l.*, “and also such other sum as by reference to his books might be due,” and as the latter words could not be rejected, since the whole constituted one entire promise, the instrument was too indefinite to be considered as a promissory note. Here, the addition is insensible, and cannot vitiate the note.

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Watson, contra, contended that the instrument was a special agreement, and could not be declared upon without shewing the consideration.

PARKE, B.—This instrument is not a promissory note. It contains a promise to pay a specific sum, and something else. It seems to me, that the additional words are not insensible, they import that something further is to be paid. Probably they are pecuniary fines, but at all events they are something *plus* the money secured. Then, as these words cannot be rejected, the count is bad. As, however, there is a good count, and there is a general verdict for the plaintiff, he is entitled to claim a *venire de novo*, that the jury may assess the damages separately.

Rule accordingly.

(a) 2 Stark. 375.

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HALL and Others v. ROUSE.

By an order of Nisi Prius a verdict was entered for the plaintiff, subject to the award of an arbitrator. The plaintiffs' attorney neglected to deliver the order of reference to the arbitrator until after the time for making the award had expired:—*Held*, that it was irregular to try the cause a second time without getting rid of the previous verdict, and that such irregularity was not waived by the defendant attending an order for the examination of the plaintiffs' witness.

THIS cause came on for trial at the Liverpool Summer Assizes, 1837, when the parties agreed to a reference, and an order of Nisi Prius was drawn up, by which it was ordered that the jury find a verdict for the plaintiffs by consent, damages 1000*l.*, costs 40*s.*, subject to be reduced or vacated, and instead thereof a verdict for defendant, or a nonsuit, entered, according to the award thereafter mentioned, and by which the cause and all matters in difference were referred to the award of a barrister, so as he made and published his award in writing on or before the 1st of November then next, and with power to enlarge the time as he should think fit. The usual stipulations were also inserted. The plaintiffs' attorney neglected to deliver the order of Nisi Prius to the arbitrator until after the time within which the award was to be made had expired. The parties subsequently met before the arbitrator, when the defendant refused to proceed with the reference. The cause was in consequence again set down for trial, and on the 13th of November the plaintiffs' attorney obtained an order to examine a witness who was ill upon interrogatories, pursuant to 1 Will. 4, c. 22, s. 4. The examiners were appointed under this order, and the attorney for the defendant attended the examination, and cross-examined the witness. No *postea* was entered on the record. The plaintiffs afterwards gave notice of trial for the Spring Assizes at Liverpool, 1838, entered the cause, and tried it. The counsel for the defendant objected to the trial taking place; but it being persisted in, they offered no defence to the action, conceiving that a verdict for the defendant or a nonsuit would be unavailing, as a verdict had been already taken which had not been in any way vacated or set aside. A second verdict having been found for the plaintiffs—

Cresswell, on a former day, obtained a rule to set it aside, and for a new trial.

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Hoggins shewed cause.—The defendant is not in a situation to make this application, since if there has been any irregularity he has consented to waive it, by acquiescing in the proceedings which have been taken. By attending the order for the examination of the plaintiffs' witness, and by cross-examining, he has admitted the propriety of the cause being again sent down for trial. That proceeding could only have been with a view to another trial, as the defendant had already refused to proceed with the reference. *Harper v. Abrahams* (a), and *Hall v. Phillips* (b), expressly decided that where a verdict is taken with damages subject to the award of an arbitrator, if the arbitrator omit to make his award within the specified time, the Court will send the cause down to a new trial. [*Parke, B.*—In *Harper v. Abrahams* the arbitrator died; but the objection arises from the lapse of the time for making the award: may not the time be extended under the 3 & 4 Will. 4, c. 42, s. 39?] It is submitted that the statute will not apply to a mere order of reference which has never been acted upon.

Cresswell and *Henderson* in support of the rule.—A verdict having been taken subject to a reference, it is irregular to take the cause again down for trial until that verdict has been disposed of. In *Evans v. Davies* (c) a verdict for the plaintiff was entered by consent, subject to the award of an arbitrator: no award was made within the time limited, and the time was further enlarged by consent: the enlarged time having also expired without an award being made, the plaintiff gave notice of trial, and proceeded to the trial of the cause, and obtained a verdict. A Judge's

(a) 4 Moore, 3. (b) 9 Bing. 89. (c) Ante, Vol. 3, p. 786.

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order having been previously obtained for altering the record with a *distringas*, the clerk of assize at the trial erased the indorsement of the previous verdict, and entered the new verdict in the usual way. The Court set aside the latter verdict for irregularity. The fact of no judgment having been entered does not alter the case, as there could be no entry until the award was made. Secondly, there has been no waiver of the irregularity. The order of reference has not become a nullity, since it was competent for either party to apply under the 3 & 4 Will. 4, c. 42, s. 59, for an enlargement of the time, and to proceed with the reference, *Potter v. Newman* (a). Then, the order of reference being in force, it was no waiver to attend and cross-examine the plaintiffs' witness. It is the constant practice to order a commission for the examination of witnesses while a new trial is pending. The order in this case is made prospectively, and it is to be assumed that the party obtaining it will do all that is necessary to put himself in a proper situation to enable him to use it at a subsequent trial. [*Alderson, B.*—It appears from the case of *Bacon v. Creswell* (b), that an application should have been made to try *de novo*, but if a new trial is to be had, the examination must be considered as made upon a valid order, and as if, in fact, the former verdict had been set aside.]

PARKE, B.—I was at first impressed with an idea that there had been a waiver of the irregularity, but I doubt whether there is any irregularity. There is no substantial difference, whether there has been merely an entry in the book of the associate, or an entry upon the record; the order of reference is an admission that there has been a verdict, and that must be got rid of. It would be irregular to suffer the former verdict to remain, unless both parties agreed to waive it. The plaintiffs have shewn

(a) 3 C. M. & R. 742.

(b) 1 Hodges, 189.

their intention so to do, and if there had been any act done by the defendant—not merely a non feasance—but an act necessarily importing that a second trial must take place, I should have been of opinion that the rule must have been discharged. I was at first struck with the argument of Mr. *Hoggins*, who contended that the cross-examination of the witness was such an act, but that proceeded upon the assumption that no valid order could be made for the examination of a witness while the former verdict remained. But I see nothing to prevent the Court from making a prospective order. There are no words of restriction in the act of Parliament. It seems to me that the examination of the witness was a valid examination, although the former verdict stood upon the record. I am of opinion that there was no waiver, and that the rule must be absolute.

ALDERSON, B.—I am of the same opinion. It was irregular to try the cause again after a verdict had been taken at Nisi Prius. If the arbitration could not be proceeded with, it was competent for the plaintiff to apply to the Court to set aside the verdict. *Bacon v. Creswell* is an authority for that position. But then it is contended that the irregularity has been waived. Though the cross-examination of the plaintiffs' witness by the defendant is clearly an admission, that if a new trial is to take place the arbitration is to be at an end, I do not see how it is a waiver of the former verdict, inasmuch as it may have been done upon a tacit condition that the party should put himself in a situation to proceed at the next assizes. Though an action is still pending, an order for the examination of witnesses may be made upon the faith that the party obtaining it will put himself in a condition to try regularly. For these reasons I think the second trial irregular.

GURNEY, B., concurred.

Rule absolute.

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COMPTON v. TAYLOR.

The declaration stated that the plaintiff complained of the defendant being detained &c. in an action on promises, and he demands of him the sum &c. which he owes to and unjustly detains from him. The first two counts were upon bills of exchange, and stated that the defendant promised the plaintiff to pay the same &c.: there were also indebtedness counts in debt, and the whole concluded "whereby an action hath accrued to the plaintiff to demand and have the said monies respectively &c., yet the defendant hath not paid &c.:"—*Held*, that the first two counts were in debt.

THE plaintiff declared as follows:—Joseph Compton, the plaintiff in this suit, by William Smith, his attorney, complains of John Taylor being detained at the suit of the said Joseph Compton, in the custody of the sheriff of Surrey, in an action on promises, and he demands of him the sum of 450*l.*, which he owes to and unjustly detains from him. For that, whereas the plaintiff on &c. made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay the plaintiff the sum of 30*l.* four months after the date thereof, which period has now elapsed; and the defendant then accepted the said bill, and promised the plaintiff to pay the same according to the tenor and effect thereof, but the defendant did not pay the same when due; And whereas the plaintiff, on the day and year last aforesaid, made one other bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff the sum of 20*l.* four months after the date thereof, which period has now elapsed: and the defendant then accepted the said bill, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his said acceptance thereof, but the defendant did not pay the same when due; And whereas the defendant on &c. was indebted to the plaintiff in 200*l.* for the price and value of goods then sold and delivered by the plaintiff to the defendant at his request, and in 100*l.* for interest due and owing from the defendant to the plaintiff, for the forbearance of divers large sums of money, due and owing from the defendant to the plaintiff, and by the plaintiff for a long space of time forborne to the defendant at his request; and in 100*l.* for money found to be due from the defendant to the plaintiff, on an account then stated between them, which said seve-

ral monies were to be respectively paid by the plaintiff to the defendant on request, *whereby and by reason of the non-payment thereof an action hath accrued to the plaintiff to demand and have of and from the defendant the said several monies respectively, amounting to the sum of 450*l.* above demanded.* Yet the defendant hath not paid the said sum above demanded, or any part thereof, to the plaintiff's damage of 450*l.*, and thereupon he brings his suit.

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Special demurrer and joinder.

The cause assigned for demurrer (amongst others) was, that there is a misjoinder of action in the declaration, part of the declaration being in an action on promises, and the remainder in an action of debt.

Thomas, in support of the demurrer.—The declaration sets out the writ, which is stated to be sued out in an action on promises, then follow two counts in assumpsit, and others in debt. [*Parke*, B.—May not the words in the writ, “on promises, and he demands of him 450*l.* which he owes to and unjustly detains from him,” be rejected as surplusage?] In *Dalton v. Smith* (a), a count stated, that, in consideration that the plaintiff, at the special instance and request of the defendant, had sold and delivered divers goods, &c. of him, the plaintiff, to the defendant, he, the defendant, undertook and faithfully promised to pay him so much as the said goods, &c. were reasonably worth, when he, the defendant, should be thereunto afterwards requested: averment, that they were reasonably worth 20*l.* whereof the defendant had notice, whereby an action hath accrued to the plaintiff, to have of and from the defendant the said last mentioned sum of money, other parcel of the said sum of 100*l.* above demanded; and it was held that this was not a good count

(a) 2 Smith, 618.

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in debt. So, in *Brill v. Neale* (a), it was held, that a count, stating the defendant was indebted to the plaintiff for work and labour, and that being indebted, he undertook, and promised to pay, &c., whereby an action had accrued to the plaintiff, was not a good count in debt, and could not be joined in the declaration with counts in debt. [Lord Abinger, C. B.—In those cases no breach was alleged: how is it the less a debt because the defendant has promised to pay it? The first two counts do not contain the words, “for value received,” without which they are not good counts in debt.] [*Alderson*, B.—The form given by the Judges makes no distinction between debt and assumpsit: the first two counts follow that form.]

Peacock, contra.—*Cloves v. William* (b), is precisely in point. There, the count stated, that the defendant accepted a bill, and promised to pay the amount, whereby an action had accrued to the plaintiff to demand the amount, and it was held to be a count in debt. As to the omission of the words “value received,” that objection can only apply to the first two counts: the demurrer, therefore, is too large.

PARKE, B.—*Cloves v. Williams* decides the point. I was anxious to see if there was any authority for what seems so inconsistent with common sense. It is true that, in the old form of debt upon a bill of exchange, the word “agreed” is used, but there seems to me no substantial distinction between “promised” and “agreed.” As to the other objection, that can only apply to the first two counts; therefore the demurrer is too large.

Judgment for the plaintiff.

(a) 3 B. & Al. 208.

(b) 3 Bing. N. C. 869.

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THOMAS v. JONES.

THIS cause came on for trial before *Williams, J.*, at the last Spring Assizes for the county of Carnarvon. The jury having appeared, the defendant challenged the array, upon the ground that the under-sheriff who had summoned the jury was the attorney for the plaintiff. This was denied, and application was made to the learned judge to appoint triers; but he refused. The challenge and answer were put upon parchment and annexed to the record. The cause was tried, and a verdict found for the plaintiff.

Welsby, in Easter Term, obtained a rule to arrest the judgment. He cited *The King v. Edmonds* (a).

Jervis shewed cause, and objected that the application was too late, not having been made within the first four days of the term after the trial: *Lane v. Crockett* (b), *Weston v. Foster* (c). Formerly, there seemed to be conflicting decisions in the three courts, as to when it was necessary to move in arrest of judgment. But now the practice is settled by the 65th section of the first rule of Hilary Term, 2 Will. 4, which prescribes that, "no motion in arrest of judgment, or for judgment non obstante veredicto, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the jury process be returnable in the same term." It is said, that this rule applies only to causes tried *in term*, *Brook v. Finch* (d), but it is submitted that it is applicable to all cases. But if the court should be of opinion that it does not apply to a case like the present, then the old practice must be resorted to. This Court has always followed the

A motion in arrest of judgment, or for judgment non obstante veredicto, must, in this Court, be made within four days of the time of trial if in term, and if not, within the first four days of the next succeeding term.

Quære, if the 65th section of 1 Reg. Gen. H. T. 2 Will. 4, applies to trials out of term.

(a) 4 B. & Ald. 471.

(c) 2 Bing. N. C. 701.

(b) 7 Price, 566.

(d) Ante, p. 313.

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practice of the Court of Common Pleas, (which required the motion to be made within the first four days of term), and not of the King's Bench. Secondly, The application should not have been to arrest the judgment, but for a venire de novo: *Brunskill v. Giles* (a). Besides, if the defendant meant to insist upon the objection he should have withdrawn; by defending the case he has waived his right to complain of the informality in summoning the jury.

Welsby, contra.—Under the old practice a party might move in arrest of judgment at any time before judgment was actually signed. [*Alderson, B.*—If the new rules do not apply, this is a casus omissus, and we must follow the old practice.] In Manning's Exchequer Practice, 353, it is said that the motion may be made at any time before judgment, and *Taylor v. Whithead* (b), and *The King v. Holt* (c), are cited as authorities. [*Alderson, B.*—The reason why the Court of King's Bench adopted that practice was, that being a court of criminal judicature it was ready to interfere at any time before punishment. In *The King v. Holt*, *Grose, J.*, says, "The motion for a new trial seems to have been made on a mis-application of the rule respecting motions in arrest of judgment. But what passes every day in this Court will leave the subjects of this country in no difficulty on this point, for though the rule be settled that after the first four days, the defendant cannot move for a new trial, yet whenever the Court have seen of themselves, or on the suggestion of counsel, that the defendant has been improperly convicted, they always have interposed (and I take it for granted always will interfere) to prevent judgment being passed on an innocent man."] But secondly, it is said that the application should have been for a venire de

(a) 2 M. & Scott, 44.

(b) 1 Doug. 745.

(c) 5 T. R. 436.

novo, and not to arrest the judgment. If so, there is no rule which requires an application for a venire de novo to be made within the first four days of term. *The King v. Edmonds* (a). [Parke, B.—It would seem to follow the practice on motion in arrest of judgment.] There are no express authorities on the subject.

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PARKE, B.—I think that every application to arrest the judgment, and also for judgment non obstante veredicto, must be made within four days of the time of trial if in term, and if not, within the first four days of the next succeeding term. The object of the new rules was to assimilate the practice in all the Courts in cases, where it had previously differed, and if this case is not within them still the application is too late, as reference must then be had to the old practice of this Court. It appears that formerly in the King's Bench the motion might have been made at any time, before the judgment was signed; but, in the Common Pleas, the motion must have been made within four days of the return of the distringas, or habeas corpora. It appears from the case of *Lane v. Crockett* that, in this respect, the Court of Exchequer followed the practice of the Common Pleas, so that there is a direct authority for our decision. Nothing has been cited against that practice but a suggestion in Mr. Manning's Book of Practice, which is only supported by cases from the King's Bench. But if we look at the new rule, I think it will appear that it was intended to apply to every case, and that if a cause is tried out of term the motion should be made within the first four days of the term next occurring after the trial. But, whether this case falls within the rule or not, we have authority for saying that this Court formerly adopted the practice of the Court of Common Pleas and not of the King's Bench. This application, then, comes too late. The rule is not an unwise one, as

(a) 4 B. & Ald. 471.

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the one party has a remedy by writ of error, and the other has the benefit and security of bail in error.

BOLLAND, B.—In Tidd's New Practice, 538, it is said "within the time limited by the above general rule the defendant may move to set aside a verdict and have a new trial, or after a point reserved, that a nonsuit may be entered, or he may move in arrest of judgment, and either party may move for a repleader, or venire facias de novo." The present application, therefore, seems to me too late, as this Court has required the motion to be made within the first four days.

ALDERSON, B.—Notwithstanding the case of *Taylor v. Whitehead*, I think this application is too late. If this Court had followed the practice of the Court of King's Bench and not of the Common Pleas, I should have considered, whether it was not a reasonable construction of the new rule, that it should apply to all cases, whether tried in or out of term, as I cannot see why the party is to have more than four days of the ensuing term, because the cause happens to be tried out of term.

Rule discharged.

INMAN v. HILL.

A demand by the attorney in the cause is sufficient to ground an attachment for non-payment of the costs of postponing a trial, although the Master has directed them to be paid "to the plaintiff."

WELSBY moved for an attachment for the non-payment of costs pursuant to the Master's allocatur. The costs had been incurred by the postponement of a trial at the assizes, in consequence of the absence of a material witness, and the Master had directed that they should be paid "to the plaintiff." The officer objected to draw up the rule because the demand had been made by the attorney in the cause, and not by the plaintiff. It was submitted, that as these were costs in the cause, the demand was

sufficient, and no letter of attorney was necessary : *Cox v. Salmon* (a).

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Lord ABINGER, C. B.—I think the demand was sufficient, because these are costs, which the attorney is authorized to receive.

Rule absolute.

(a) 2 M. & W. 127.

EDMUNDS v. CATES.

KNOWLES moved to set aside the taxation of costs, on the ground of the insufficiency of the notice.

Notice of taxation had been given after eight o'clock on Friday evening for twelve o'clock the next day; he submitted that this was not "one day's notice," as required by the 12th rule of Trinity Term, 1 Will. 4 (a).

Notice of taxation, given before nine o'clock in the evening, for twelve o'clock on the following day, is a good day's notice within the rule of T. T. 1 Will. 4.

PER CURIAM.—Such notice given at any time before nine o'clock in the evening is good for twelve o'clock on the following day.

Rule refused (b).

(a) Ante, vol. 1, p. 105. See also 17 Reg. Gen. H. T., 4 Will. 4, (Practice Rules), ante Vol. 2, p. 308. (b) See 1 Reg. Gen. H. T., 2 Will. 4, s. 50. Ante Vol. 1, p. 189.

MAY v. PIKE.

BLAIR shewed cause against a rule obtained by *Pike* for setting aside the judgment for irregularity. An appearance had been entered by the plaintiff for the defendant according to the statute, and there was no attorney for the defendant on the record. It appeared, however, that a Mr. Dickenson, an attorney, had accepted the

A person who has acted as attorney in the cause, cannot be changed without an order for that purpose, although he is not the attorney on the record.

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declaration as the attorney of the defendant, and was so treated by the plaintiff. Time for pleading was obtained by Mr. Dickenson. A summons for further time to plead was taken out by a different attorney, and the plaintiff, treating this as a nullity, signed judgment when the previous time for pleading had expired.

Pike, in support of the rule, contended, that as there was no attorney on the record, it was not necessary to obtain a rule for the purpose of changing the attorney.

PER CURIAM.—The first gentleman having acted as the attorney in the cause up to a certain time, could not be changed without an order for that purpose.

Rule discharged.

ALLEN v. PINK.

The declaration stated that in consideration that the plaintiff would buy of the defendant a certain horse for 7*l.* 2*s.* 6*d.*, the defendant promised the plaintiff that it was a quiet worker, and would go well in spare harness. It then averred the purchase of the horse, and that it was not a quiet worker, and would not go well in spare harness, whereby the plaintiff was put to charges in keeping and taking care of it. There were also counts for money had and received, and money due on an account stated:—*Held*, that this record might be sent for trial before the sheriff, under the 3 & 4 Will. 4, c. 42, s. 17.

ASSUMPSIT.—The declaration stated that, in consideration that the plaintiff would buy of the defendant a certain horse for a certain sum, to wit, 7*l.* 2*s.* 6*d.*, the defendant promised the plaintiff that the horse was then a quiet worker, and would go well in spare harness. It then averred the purchase of the horse by the plaintiff, and the payment of the price, and alleged as a breach that the horse was not a quiet worker, and would not go in spare harness, but on the contrary thereof, was unquiet and vicious, and became of no use or value to the plaintiff, whereby he was put to charges and expenses in keeping and taking care of it. There were also counts for money had and received, and upon an account stated. To the plaintiff's damage of 20*l.* The defendant pleaded, first, non assumpsit to the whole declaration; secondly, to the

first count, that the horse was a quiet worker, and would go well in spare harness, upon which issue was joined.

On the trial before *Arabin*, Serjt., at the Sheriff's Court in London, it appeared, that in the month of April the plaintiff went to look at the horse in question at Aldridge's repository, when the defendant, speaking of the horse and his price, said, "that if he did not work well, and go quietly in spare harness, the plaintiff was to send him back, and he should have his money returned." After some further conversation, the plaintiff bought the horse for 7*l.* 2*s.* 6*d.*, which he paid, and the defendant gave him the following memorandum:—

" April 18, 1838.

" Bought of G. Pink a horse for the sum of 7*l.* 2*s.* 6*d.* —G. Pink."

It afterwards appeared that the horse was vicious and unquiet, and not a good worker, upon which the plaintiff sent him back on the 23rd of April, and demanded his money, which was refused. There was an indorsement on the writ, claiming 7*l.* 2*s.* 6*d.*, and the particulars of demand were as follow: " On the indebitatus counts the plaintiff seeks to recover 7*l.* 2*s.* 6*d.*, the price of a horse, which sum was fraudulently received by the defendant, under colour of a contract of sale thereof to the plaintiff, with a warranty which the defendant knew to be false, and which horse the defendant has subsequently received back." The writ of trial had been obtained by consent of the parties. A verdict having been found for the plaintiff for 7*l.* 2*s.* 6*d.*

Byles obtained a rule to set aside the verdict, and for a new trial, on the ground that the sheriff had no authority to try the cause (*a*).

(*a*) It was also objected that as the terms of the contract were to be found in the bought note, no evidence of the warranty was ad-

missible; and that if the parol contract was to be taken at all, there was no warranty in it.

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Gurney shewed cause.—It is submitted that the judge had jurisdiction to try this case. The 17th section of the 3 & 4 Will. 4, c. 42, does not prohibit a case like the present from being tried before the sheriff. There is nothing to shew that this is not a “debt or demand” under 20L. As the Judge’s order was obtained by consent, it must be assumed that all circumstances concurred to give the sheriff jurisdiction. *Watson v. Abbott* (a), *Smith v. Brown* (b), and *Edge v. Shaw* (c), will perhaps be cited on the other side, but they were all cases of *tort*, and there is no authority that an action of *assumpsit* under circumstances like the present is not within the act. *Price v. Morgan* (d) is in point: there, the first count of the declaration stated, that in consideration that the plaintiff would send a pony to the defendant, and would sell and deliver it to A., the defendant undertook that he was authorized by A. to purchase it on his behalf; that the plaintiff sent the pony to the defendant, and was willing to sell it to A., but that the defendant had no authority from A. to purchase it. The second count was a similar one, but stating that the defendant undertook himself to purchase the pony. There was also an *indebitatus* count for a pony sold and delivered, and it was held that this was a record which might be sent by writ of trial before the sheriff, and *Parke, B.*, says, “I am of opinion that the action was in substance for the price of the pony, and therefore within the act; and if it were not, I should hesitate, when the writ has been obtained by the plaintiff himself, to grant a new trial on the ground of want of jurisdiction in the under-sheriff. The same point was certainly mentioned in the argument in *Watson v. Abbott*, but from the observations of *Bayley, B.*, and the rest of the Court, they do not appear to have sufficiently considered it. Therefore, as at present ad-

(a) Ante, Vol. 2, p. 215.

(b) Ante, Vol. 5, p. 736.

(c) Ante, Vol. 4, p. 189.

(d) 2 M. & W. 53.

vised, I am disposed to discharge the rule on that ground. It is not necessary, however, to give a direct opinion on that, because I think in substance that the case was within the act." Here the verdict was for 7*l.* 2*s.* 6*d.*, the price of the horse.

The Court then called upon

Byles in support of the rule. The 17th section of the 3 & 4 Will. 4, c. 42, enacts "that in any action depending in any of the superior courts for any debt or demand in which the sum sought to be recovered, *and indorsed on the writ of summons* shall not exceed 20*l.*, it shall be lawful for the Court, &c., or any judge, if such court or judge shall be satisfied that such trial will not involve any difficult question of fact or law, to order and direct that the issue joined shall be tried before the sheriff, &c." On referring to the rule of H. T. 2 Will. 4, it will appear what the meaning of the words "debt or demand" in the statute is. The rule prescribes "that upon every bailable writ and warrant, and upon the process or any copy served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy, and service, attendance to receive debt and costs." The 17th section of the act has reference to this rule. [Lord *Abinger*, C. B.—What meaning do you give the word demand?] The words "debt or demand" are used in the bankrupt act, yet unliquidated damages cannot be proved under a fiat. They are also to be found in many acts establishing courts of requests, but there the interpretation now contended for, has never been put upon them. In *Smith v. Brown*, which was an action against a carrier for negligence, the cause was tried by consent before the under-sheriff of Bristol, and this court held that the trial was a nullity and that no judgment could be given. If

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the verdict had been taken on the last two counts, there might have been less ground for the objection, but all the evidence applied to the first count only.

LORD ABINGER, C. B.—The case of *Price v. Morgan* is very analogous to the present. That was an action of assumpsit, and the Court there thought that the word “demand” was not ejusdem generis with that of debt, but had a more extensive signification; and that when it appeared on the face of the declaration that the demand was for a sum certain, such a case must be considered within the act. I think we ought to adhere to that decision, for this is not a stronger case than that. There the action was for damages, here also it is for the breach of an engagement. In my opinion, this case is clearly within the spirit of the act.

BOLLAND, B.—But for the case of *Price v. Morgan*, I should have doubted whether the act of Parliament applied to a case like this. I always considered it limited to money demands; as, however, there is authority in point, restrictions should not be placed upon the act, especially when it is considered that two objects are contemplated by it, namely, the lessening of expense and facility of trial.

ALDERSON, B.—I consider the first point determined by *Price v. Morgan*. This case does not fall within the principle of *Smith v. Brown*, for it is in fact an action for the price of the horse only.

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INFORMATION by the Attorney-General against the defendant to recover certain arrears of assessed taxes. The first count of the declaration stated, that the defendant was indebted to his Majesty in the sum of 80*l.*, for that before and at the time of the making the assessment in that count mentioned, to wit, on &c., in the year 1834, at the parish of St. George, Hanover Square, the defendant was a person chargeable to certain duties of assessed taxes payable to his Majesty by virtue of the statutes in that case made and provided, and that being so chargeable, afterwards he was in due manner, according to the form of the statute, &c., assessed for the said duties in the sum of 40*l.*, for the year ending the 5th of April, 1835, whereof he had notice; and that afterwards, to wit, &c., a certain warrant for collecting and levying the said duties was in due manner issued out and delivered to a certain collector of the said duties for the said parish. And the Attorney-General further says, that the said sum of money, being the amount of the said duties assessed as aforesaid on the defendant, have not been, nor could, nor can be levied or collected under or by virtue of the said warrant, and that the same and every part thereof still remained and was due, and in arrear, and unpaid to his Majesty, and that the defendant still owed the same and every part thereof to his Majesty, whereby an action hath accrued to his Majesty to demand the said sum of 40*l.* The second count, which was similar to the first, sought to recover 40*l.* for the year ending the 5th of April, 1836. Plea, the general issue.

At the trial before Lord *Abinger*, C. B., at the sittings after Hilary Term, 1837, the only evidence on the part of the Crown was the production from the Head Office of the Commissioners of Stamps and Taxes of the schedule of defaulters for assessed taxes, made pursuant to the

An information in the nature of the popular action of debt cannot be maintained for the recovery of arrears of assessed taxes, (the 5 & 6 Will. 4, c. 20, s. 13, having made such debt recoverable as a debt upon record), but the proper mode of proceeding is by *scire facias*, extent, or by filing an information upon the record itself.

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43 Geo. 3, c. 99, s. 45 (a), from which it appeared that the defendant was a defaulter in those two years to the amount

(a) "And be it further enacted, That the collectors appointed as aforesaid, shall make a due return fairly written on paper, under their hands, to such commissioners, containing the names, surnames, and places of abode of every person within their respective collections, from whom such collector or collectors shall not have been able to collect or receive such duties for any of the causes before mentioned, and which shall have been duly verified on the oath of such collector as aforesaid, and the particular reason for returning each defaulter, and the sum and sums charged upon every such person; and such commissioners, after due examination thereof on the oaths or affirmations as aforesaid of the collectors, shall ascertain the sums which, according to the provisions of any of the said acts herein mentioned, shall have been discharged from assessment for any cause therein specially allowed; and the said commissioners shall also make out their schedules containing the sums so discharged, and the sums with which each and every such defaulter ought to be charged, and the sums which shall not have been collected by occasion of the collector's neglect, and which ought to be re-assessed on the parish, ward, or place as aforesaid, and shall cause the said several particulars to be inserted in a schedule fairly written on parchment, under the hands and seals

of such commissioners or any two or more of them, containing the names and surnames of the said collectors, and the same to be delivered to the Receiver-General, to be returned by such Receiver-General into his Majesty's said Court of Exchequer, whereupon every person so making default of payment, and each parish, ward, or place so in default, may be charged by process of court according to the course thereof in that behalf; and in default of such schedule made out according to the directions of this act, it shall be lawful for the Receiver-General, and he is hereby required to return every such parish, ward, or place *insuper*, for all sums not paid to the Receiver-General, and contained in the duplicate of assessment to him delivered, and all such sums so returned shall in such case be re-assessed on such parish, ward, or place. And all and every the proper officers therein concerned shall, and they are hereby required to take care, from time to time, that such process be duly issued and made effectual, so that all such sums as shall be in arrear and unpaid as aforesaid, may be speedily recovered and paid into his Majesty's Exchequer; and if any such collector shall neglect or refuse to make such return in manner before directed, every such collector shall forfeit the sum of one hundred pounds."

of 59*l.* 7*s.* 6*d.* It was contended on the part of the Crown that, by the 5 & 6 Will. 4, c. 20, s. 13, such schedule was conclusive evidence against any person named therein as making default in payment. For the defendant it was objected, that this information could not be supported, inasmuch as the latter part of the 13th section declared this to be a debt upon record, on which no personal information in the nature of an action of debt could be founded, and that the proper mode of proceeding was by writ of scire facias or extent. The *Lord Chief Baron* was inclined to think the objection valid, and a verdict was entered for the Crown, with liberty for the defendant to move to enter a verdict in his favour.

Price having in Easter Term, 1837, obtained a rule accordingly,

The *Solicitor-General* and *Amos*, in Trinity Term, shewed cause.—The question depends upon the construction to be put upon the statutes relating to the assessed taxes, the 43 Geo. 3, c. 99, the 43 Geo. 3, c. 161, and the 5 & 6 Will. 4, c. 20. [Lord *Abinger*, C. B.—The question is, whether you can proceed by information, treating this as a debt due to the Crown, when the act of Parliament declares it to be a debt upon record. Formerly, the schedule was a record of the Exchequer, but the 13th section of the 5 & 6 Will. 4, c. 20, requires that it should be deposited and remain with the Commissioners of Stamps and Taxes, and be a record there.] Notwithstanding that section it is submitted, that the Crown may proceed to recover this debt by the ordinary mode. By the 43 Geo. 3, c. 99, s. 9, the commissioners for executing the act are to meet annually, and appoint assessors of the duties of the different parishes and places, who upon a certain day are to bring in their certificates of assessments in writing, verified upon their oaths; and at the

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same time they are to return the names of two persons to be collectors. By the 12th section, the assessments delivered in by the assessors shall be signed by the commissioners, and they shall also sign three duplicates of the assessments, and deliver them to the collectors, with warrants under the hands of the commissioners for collecting the same, upon which the collectors are to make demand of the sums charged upon the respective parties at their last places of abode, and, upon payment, to give acquittances, which shall be perfect discharges. By the 20th section, inspectors and surveyors are to be appointed. Section 24 gives a power of appeal to commissioners in case of surcharge. By section 29, this decision is final. Section 33 gives the collectors a power of distraining upon non-payment of the duties, and of selling; and, in certain cases, commissioners may imprison the parties making default. The 44th and 45th sections (a), regulate the proceedings in case the collector cannot obtain the money. Then the 43 Geo. 3, c. 161, makes further provisions. The 23rd section (b), directs that such duties as cannot be col-

(a) See note (a).

(b) "And be it further enacted, That every assessment to be made of the said duties in pursuance of this act in *England, Wales, and Berwick-upon-Tweed*, shall be in force for one whole year, commencing from the fifth day of *April* in the year in which the same shall be made, and ending on the fifth day of *April* then next following, and the said several duties shall be paid by quarterly instalments on the days hereinafter mentioned, (that is to say), on the twentieth day of *June* for the quarter commencing from the fifth day of *April* and ending on

the fifth day of *July*; the twentieth day of *September*, for the quarter commencing from the fifth day of *July* and ending on the tenth day of *October*; and the twentieth day of *December*, for the quarter commencing from the tenth day of *October* and ending on the fifth day of *January*; and the twentieth day of *March*, for the quarter commencing on the fifth day of *January* and ending on the fifth day of *April* in every year; the first payment thereof to be made on the twentieth day of *June*, one thousand eight hundred and four: and it shall be lawful for the respective commissioners,

lected may be recoverable as a debt upon record to the King's Majesty, his heirs and successors. In the present case the whole proceedings were conformable to these acts, the assessments were made and delivered to the collectors, and a schedule of defaulters made and returned to the commissioners, who made a copy of it and returned it to the Receiver-General, by whom it was transmitted to the Court of Exchequer. Then came the 5 & 6 Will. 4, c. 20, s. 13, by which it is enacted "that all such schedules as aforesaid which shall be made out at any time after the commencement of this act shall be delivered over or transmitted by the Receiver-General, Receiving-Inspector, or other receiver to whom the same shall have been delivered, to the Commissioners of Stamps and Taxes, and shall be deposited and remain in the head office of the last-mentioned commissioners; and the production of any schedule so deposited, and purporting to contain the name or names of any such defaulter or defaulters as aforesaid, shall be conclusive evidence against any person named therein as making default of payment, and against every parish, ward, or place named therein as in default of the sum or sums mentioned in any such schedule being due, and owing, and in arrear, and unpaid to his Majesty, his heirs and successors, unless payment thereof shall be proved; and every such sum shall be recoverable from the person and persons making default of payment thereof as a debt upon record to the King's Majesty, his heirs

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or any two or more of them, and they are hereby required, as soon as the assessment shall be made, to issue out and deliver to the respective collectors their warrants for the speedy and effectual levying and collecting the said duties, as the same shall become payable, by quarterly instalments as aforesaid; and such part thereof as can-

not be so levied and collected may be recoverable as a debt upon record to the King's Majesty, his heirs and successors, with full costs of suit and all charges attending the same; and when so recovered, the said duties shall be paid to the Receiver-General in aid of the parish or place answerable for the same.

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and successors, with full costs of suit, and all charges attending the same." It is contended on the other side, that if the proceeding had been by scire facias, the defendant would have been let in to give evidence, that the debt was not due; but it is submitted that that is not so. The statute does not mean that the proceeding must be upon the schedule as if it were a record, but only that the production of the parchment should be conclusive evidence, as in debt on a record. [Lord *Abinger*, C. B.—It is very probable that the persons who drew these clauses had not any very accurate knowledge of the forms of action. The 43 Geo. 3, c. 161, s. 23, requires the commissioners to issue their warrant to the collector, and such part as cannot be collected may be recoverable as a debt on record to the King; therefore, the record was a record of this Court.] Then the subsequent act says it shall be lodged with the commissioners, and not in this Court. If it were a record there was no occasion to say that it should be conclusive evidence. [*Alderson*, B.—Should you not have filed the schedule in this Court in order to proceed upon it?]

Price, contra.—The question depends upon the nature of the debt; the nature of the proceeding upon the new duties given to the Crown, and the old mode of enforcing them. A debt on record to the King means a Crown judgment, upon which nothing further can be done. [Lord *Abinger*, C. B.—A debt of record is not necessarily a judgment—for instance, a person may come and acknowledge a recognizance.] It is true that a bond to the King is only matter quasi of record, but this is more than a bond debt, it is a debt enrolled, though instead of being in the King's Remembrancer's Office, the act requires it to be lodged in the Head Commissioner's Office of Stamps and Taxes. [*Alderson*, B.—Then you contend that the Commissioners of Stamps and Taxes are now officers of

the Court of Exchequer.] Unquestionably, every person concerned in the collection of the King's revenue, is an officer of this court, and under its controul. The Crown has a particular process for the recovery of its debts, and which cannot be departed from. By this mode of proceeding, the debt is delayed and the expense increased. The statute only makes the schedule evidence of nonpayment, and not evidence of the debt. Much useful information as to the nature of the debt is to be found in Chief Baron Gilbert's Treatise on the Court of Exchequer: it is there said (a): "Towards the time of H. 7, and H. 8, as the revenue increased, and merchants were obliged to make payments, the customers and collectors received bonds from the parties to the King. These collectors were no more than bailiffs or receivers, and not as justices between the King and the party; and therefore the acknowledgments before them were not in a court of record. And there was before 33 H. 8, 39, this difference between them and bonds of record, that these were immediately levied by the levary; but those debts not of record could not be levied by the levary, but a scire facias was to issue thereupon: and the reason of the difference is, that where an obligation is acknowledged in a court of record, such recognizance is the same as a judgment, the conusor is personally present, and the Court is supposed to know him as much as a defendant against whom they give judgment. And hence it is that the levary issues, and all the other prerogative process, *and that debt cannot be discharged until there be a receipt upon record*; but where the King's ministerial officer takes an obligation to the King, such obligation is not of record; and when the officer delivers such obligation into Court, the time of delivery is recorded, so that if that obligation be just, and the conusor has nothing to say against it, nobody can

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controvert the time of its lien, because the *delivery* is of record, and therefore it ought to bind from that time; but the obligation is no more than a warrant of attorney, for the ministerial or other person to deliver it of record, for being an act in pais and not of record, the conusor may come in at the return of the scire facias and traverse the obligation; but in this it differs from a warrant of attorney, for if a man forge a bond and warrant of attorney, and then confesses judgment, the defendant can never deny the deed, if a scire facias issued after a year and a day; but in this case there is no judgment upon the bond, for the bond is only delivered of record, and therefore the judgment upon the bond arises only on the scire facias; and therefore in Ireland they often take a warrant of attorney to confess judgment upon such bond in an action of debt, and when such judgment is entered, it is a matter of record, *and cannot be discharged but by an act of equal notoriety.*" To proceed by information is *agere actum*; it is to make that a matter in pais which is already of record. For debts in fieri, an information is the proper course (a); but when they are actually of record, a *levari* may at once issue. The nature of this proceeding is fully treated of in Price's Exchequer Practice (b), from which it appears, that "such process, notwithstanding it is in its form and general force and effect final, and in the nature of an execution, might be pleaded to on this side of the Court, both in bar or denial and in discharge of the debt, or charge upon the roll against the party who was the object of the proceeding." Blackstone and other writers put the revenue of taxes upon the ground of ancient duties to the Crown, which were leviable without any proceeding at all. It is therefore clear, that this is a defined and settled debt, upon which, the great privilege of the Court of Exchequer ought to be executed "for its speedy levy and for the

(a) Gilbert, Ex. 165.

(b) Page 544.

soonest satisfaction of the King's debt." [*Alderson*, B.—The second rule of the 43 Geo. 3, c. 161, which says "that every such schedule, being certified under the hand of the Receiver-General, or his deputy, of the county or division, where the said arrears accrued, to the Court of Exchequer, at Westminster, shall be received and taken as sufficient evidence of a debt due to his Majesty, and shall be a sufficient authority to the Barons of the said court, or any one of them, to cause process to be issued against such defaulters named in the said schedules, to levy the whole sum in arrear and unpaid by such defaulters: and the sheriff or other officer to whom the said process shall be directed, shall without delay cause the whole sum in arrear to be levied." Therefore, upon the schedule being returned, there is an express power to issue a *levari facias*.] The word "process" is used throughout; an information cannot be said to be process, which shews that the present proceeding is incorrect. [*Lord Abinger*, C. B.—It is true that where the debt is of record, the proper process for recovering it is by *levari facias*, to which the party may plead all equitable matters, or he may apply by motion, which is the more ordinary practice, to remove the hands of the sheriff, and let in the equitable claim; but the question which arises here is, whether, upon the construction of the act, the Crown may not proceed either by summary process or by information. *Alderson*, B.—The statute says, the schedule shall be conclusive evidence of the debt due and owing from the person named therein; the party might shew that he was not the person named therein.] By the 33rd section of the 43 Geo. 3, c. 99, a power of distress is given, where payment has been refused. By the 35th section, when persons remove without paying their taxes, that fact is to be certified to the commissioners of the place, where the party can be found, which commissioners are to cause the amount to be levied,

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and paid to the collector of the parish where the assessment was made. By the 41st section, collectors refusing to attend commissioners with their assessments, are to forfeit 50%, and if there is money in the hands of the collectors, which cannot be recovered under the hand of the commissioners, or the commissioners shall neglect to issue such warrant, the amount shall be recoverable as a debt on record. That clause shews that an express distinction is taken between debts recoverable as matters of record and those recoverable by information. In the 45th section, a distinction is taken between a person and the parish, and it makes express provision that all sums in arrear shall be speedily recovered. The 47th section requires "that where there has been a failure in assessing the duties on returning the duplicates, the Receiver-General shall certify the same to the Barons of the Exchequer, with the names of the commissioners, assessors, &c., who shall be respectively liable to process from time to time, by writ of distringas." Then comes the 5 & 6 Will. 4, c. 20, by the 13th section of which the Head Office of the Commissioners of Stamps and Taxes is made an office of this Court, by requiring the schedule which was formerly delivered here to be lodged in that office. [Lord Abinger, C. B.—You contend that it was the intention of the legislature to give a document not in court, the same force and effect as formerly when it was brought into court.] The latter part of the 13th section says, that "the schedule shall be conclusive evidence against any person named therein, &c., and against every parish, &c., and every such sum shall be recoverable as a debt upon record, with full costs of suit and all charges attending the same." The making it a record is the foundation for an immediate and speedy process. It is submitted that the construction contended for is in aid rather than in deterioration of the right of the Crown, and that the proceeding by information is not only repugnant

to a sound construction of the act, but also at variance with the recognised practice of the revenue laws.

The *Solicitor-General* replied.

Cur. adv. vult.

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LORD ABINGER, C. B., now delivered the judgment of the Court.—This was an information filed by the Crown, (not purporting to be filed upon any document or any record), stating that the defendant had been assessed in certain taxes, and that a warrant had issued against him signed by the commissioners, but that the sum had not been nor could be collected under it, and that the same remained due, and in arrear, and unpaid, whereby an action had accrued, &c. The information was supported at the trial by the production of the assessment itself from the tax office, in which the party appeared as in arrear for the sum sought to be recovered. It was contended on the part of the Crown that, by the 5 & 6 Will. 4, c. 20, s. 13, this assessment was made conclusive evidence; but on the other hand, it was objected by Mr. *Price*, that the same section made the debt recoverable as a debt of record, which could only be recovered by scire facias, by extent, or by filing an information upon the record itself. My impression originally at the trial was, that the objection must prevail; we have taken time to consider it, and have come to the conclusion with some reluctance, that the objection must succeed, and that a verdict ought to be entered for the defendant. It is very remarkable, that by this act of Parliament, the assessments which used to be returned into this Court are now returned to the office of the Commissioners of Taxes, and are to be kept there, and yet the person who is in arrear is made liable to pay the arrear as a debt upon record. The document which is made returnable by the act of Parliament is kept by the commissioners in Somerset House; and

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though, doubtless, the object of the act was very correct, it is very unfortunate that the words "shall be recoverable as a debt upon record" were used. We know of no means to recover it as a debt upon record but by scire facias or extent, or filing an information upon the record itself. Here, there is nothing stated, but that there was an assessment and a warrant.

Rule absolute.

SERLE v. WATERWORTH.

To debt on a promissory note, payable twelve months after date, the defendant pleaded that one J. W., before and at the time of his death, was indebted to the plaintiff in a certain sum, and that the plaintiff, after the death of J. W., and before the making of the note, applied to the defendant for payment thereof; whereupon the defendant, in compliance with the said request, after the death of J. W., for and in respect of the said debt, and for no other consideration whatever, then made and delivered

the note to the plaintiff: that J. W. died intestate, and that, at the time of the making and delivery of the note as aforesaid, no administration had been granted of the estate and effects of the said J. W., nor was there at that time any executor or executrix of his estate and effects, nor was there any person liable at that time for the said debt so remaining due to the plaintiff as aforesaid. Replication, de injuriâ:—*Held*, that as the note *prima facie* imported consideration, the plea was bad, for want of an averment that there were no assets.

DEBT upon a promissory note, dated the 23rd of January, 1837, and made by the defendant for 24*l.* 1*s.* 4*d.*, "value received," payable to the plaintiff or order twelve months after date. There was also a count upon an account stated. Plea, as to the first count of the declaration, that one J. Waterworth, before and at the time of his death, to wit, on the 2nd of January, 1837, was indebted to the plaintiff in a certain sum of money, to wit, 24*l.* 1*s.* 4*d.*, for the price and value of goods by the plaintiff then sold and delivered to the said J. Waterworth, which sum was due and owing to the plaintiff, at the time of the making the said promissory note in the first count mentioned, and the plaintiff, after the death of the said J. Waterworth, and before the making of the said note, to wit, on the 2nd of January, 1837, applied to the defendant for payment thereof, whereupon, in compliance with the said request, the defendant, after the death of the said J. Waterworth, for and in respect of the said debt, so then remaining due to the plaintiff, as aforesaid, and for no other consideration whatever, then made and delivered

the said note to the plaintiff. And the defendant further says, that the said J. Waterworth died intestate, to wit, on the same day and year aforesaid, and that at the time of the making and delivering of the said note, as aforesaid, to the plaintiff, as aforesaid, no administration had been granted of the estate and effects of the said J. Waterworth, nor was there at that time any executor or executrix of the estate and effects of the said J. Waterworth, nor was there at that time any person liable for the said debt so remaining due to the plaintiff, as aforesaid. Verification. Replication de injuria, upon which issue was joined.

At the trial before *Patteson, J.*, at the last Spring Assizes for the county of York, it appeared that J. Waterworth, the husband of the defendant, had carried on the business of a hair-dresser, and died on the 3rd of October, 1836. The defendant continued to reside in the house which adjoined the shop, but there was no evidence of her having carried on the business since her husband's death. On the 31st of December, the defendant caused an inventory to be made of her husband's effects, and they were valued at 92*l.* On the 23rd of January, 1837, the plaintiff sent an account to the defendant of a debt due from her late husband, upon which she gave to him the note in question. Letters of administration were granted to her on the 6th of March, 1837. A verdict having been found for the defendant,

Wightman, moved for judgment non obstante veredicto, on the ground that, as there was a forbearance of the debt for twelve months, there appeared a good consideration on the face of the plea (a).

Cresswell and *Addison* shewed cause.—The plea is good in law: it is in effect a plea that there was no considera-

(a) It was also contended, that, under the circumstances, the defendant was executrix de son tort; which point the Court decided in the negative.

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tion for the note. At the time the defendant received notice of the debt due from her late husband to the plaintiff, there was no person liable to pay that debt. The case has been put upon the ground of forbearance; but there could be no injury to the plaintiff if no person was liable in law to pay the debt. *Jones v. Ashburnham* (a) is in point. There, the plaintiff declared that A., since deceased, was indebted to him in a certain sum, and that after his death, in consideration of the premises and that he, at the instance of the defendant, would forbear and give day of payment for the debt, the defendant promised &c., and it was held on demurrer that there was no consideration for the promise: for a promise can only be sustained on a consideration of benefit to the defendant, or of detriment to the plaintiff. The mere existence of a debt due from A. is no consideration of a promise from B. If the defendant had been executrix the case would have been different, since the benefit she would receive from the postponement of the day of payment would have been a good consideration for the note. In *Jones v. Ashburnham*, Lord *Ellenborough* says, "It is a known rule of law that to make a promise obligatory, there must be some benefit to the party making it, or some detriment to the party to whom it is made, otherwise it is considered as a nudum pactum and cannot be enforced. *Ridout v. Bristow* (b) will, no doubt, be relied upon by the other side; but that case is distinguishable, for there, the note was expressed to be given "for value received by my late husband." Here, the defendant is not stated to be the widow of J. Waterworth, and for any thing that appears on the plea she may be a mere stranger. It is admitted, that a note *prima facie* imports a consideration, but here, the want of it is averred in the plea.

(a) 4 East, 455.

(b) 1 C. & J. 231.

Wightman, contra.—The plea is bad in point of law. The note suspends the plaintiff's right to recover for twelve months, which is a sufficient consideration for it. Suppose the defendant had pleaded that she was in possession of her husband's goods and was about to take out administration, and that being pressed for this debt she gave the note in question, could that be considered a good plea? In *Ridout v. Bristow* the jury found that there was a consideration for the note, but that was not left to them here. [*Alderson*, B.—The question there was, whether as the note was expressed to be for the debt of her late husband, it necessarily imported a want of consideration, and it was held that it did not.] The fact of her being entitled to take out administration, and being in possession of the goods is sufficient to make the note valid as against her.

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LORD ABINGER, C. B.—The real question in this case, is, whether upon the face of the plea, there appears to be any consideration for the note, as between the plaintiff and the defendant; and it seems to me that there is. The plaintiff by receiving the note had placed himself in the situation not to sue for the debt of the husband until twelve months had expired. As it is not stated in the plea, that there were no assets, the taking the note amounts to a promise on the part of the plaintiff, that he would take no measures to recover the debt, until the note became due.

PARKE, B.—*Primâ facie*, there is a good consideration for the note. The question then is, whether the plea distinctly shews that there was in fact no consideration. If it had averred that there were no assets at all, the plea would have shewn a want of consideration; but there is no such averment. The effect, then, of receiving the note is to tie up the plaintiff's hands as against the defendant for

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twelve months: it is an agreement to forbear his remedy, in case she took out administration. I cannot say whether the effect of the note would be to conclude the plaintiff from suing a third person—upon that point I give no opinion. There can be no doubt that where a person gives a promissory note at a certain date to another, the latter is precluded from suing for the debt, during the time mentioned in the note, and that being so here, it is a sufficient forbearance to constitute a consideration. This view of the case corresponds with the opinion expressed by *Bayley, J.*, in *Ridout v. Bristow*: judgment must therefore be entered for the plaintiff, non obstante veredicto.

ALDERSON, B.—All the averments contained in the plea were satisfactorily proved; the only question then is, whether it is a good plea or not. *Ridout v. Bristow*, determines that a promissory note *primâ facie* imports consideration; unless therefore, the plea negatives all considerations, the plaintiff is entitled to recover upon the note. Consistently with this plea, there is a consideration, inasmuch as the party is precluded from suing, during the time the note had to run.

Judgment for the plaintiff, non obstante veredicto.

CORNER v. SHOWE.

A venire de novo cannot be awarded where general damages are assessed upon a declaration containing a misjoinder of counts.

After a rule for arresting

the judgment was disposed of, but in the same term, the plaintiff moved for a venire de novo;—*Held*, that the application was not too late.

IN this case (*vide ante*, p. 584,) a rule had been made absolute for arresting the judgment on the ground of a misjoinder of counts, two being against the defendant in his personal capacity, and one against him as executor.

Platt, in the same term, obtained a rule nisi to vary the terms of that rule, and for a venire de novo to issue.

Channell shewed cause.—First, the application is too late; it should have been made pending the rule to arrest the judgment; secondly, a venire de novo cannot be awarded, as the objection is to the whole declaration. Where there is a general assessment of damages, and one count is defective, a venire de novo may issue—*Leach v. Thomas* (a): but not, as in this case, where all the counts are equally good, and the objection consists only in the misjoinder of them. In the former instance, the verdict may be applied to the good count, but in the latter, as here, the defect is incurable.

Platt, contra.—The application is not too late.

PARKE, B.—The Court have no difficulty upon that point. There was no formal judgment for arresting the judgment, and the application, being so soon after the determination of the rule, was in time.

Platt.—Then a venire de novo may be awarded. In *Clement v. Lewis* (b) the counts were all good, but there, the jury found for the defendant on six out of eight pleas, and for the plaintiff on the residue of those pleas, and on the first without assessing damages: and the Court awarded a venire de novo to try the first and the last issues, as far as related to the pleas on which the finding was for the plaintiff. [*Parke*, B.—In that case the jury had omitted to assess the damages on some of the counts.] It is admitted that, where the declaration contains some good and some bad counts, and the jury have found separate damages on each count, the plaintiff may enter a remittitur damna as to the bad counts, and then the verdict would stand for the residue. So, in the present case, it was the duty of the jury to find separate damages upon each

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(a) Ante, Vol. 5, p. 612.

(b) 3 B. & B. 297.

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count. There is, consequently, such a defective assessment of damages as will warrant the Court in awarding a venire de novo. Other instances in which a venire de novo has been awarded will be found in *Grant v. Astle* (a), *Witham v. Lewis* (b), Tidd's Practice (c).

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court.— In this case, a rule was made absolute in Easter Term last to arrest the judgment, on the ground of misjoinder of counts, two being against the defendant in his own right, and one against him as executor. During the same term, a rule nisi was obtained to vary the former rule, and for a venire de novo to issue, and cause was shewn against the rule.

One objection was, that the application came too late after the former rule was pronounced; but the Court disposed of that objection on the argument.

The other was, that a venire de novo could not be awarded in such a case. It had been decided in *Leach v. Thomas* that where general damages are assessed upon a declaration containing one breach ill assigned, a venire de novo ought to be awarded, a question which before that time had been considered doubtful, as there were apparently conflicting authorities upon it. Yet it is remarkable that such a doubt should exist, as this case had been provided for by an ancient rule of the Court of King's Bench, M. T. 1654, which states, "that where a verdict finds entire damages, where damages are the principal, and part not actionable, the judgment may be arrested, yet by a rule of court a venire facias de novo may issue as upon an ill verdict; and upon the new trial the party may sever his damages." And a similar rule exists of the date of 1654, in the Common Pleas, which was acted upon in

(a) 2 Doug. 722.

(b) 1 Wilson, 48.

(c) Ninth edition, p. 922.

that Court in the case of *Smith v. Howard* (a), and *Auger v. Wilkins* (b), and see *Eddowes v. Hopkins* (c).

But it is admitted that there is no precedent of such a proceeding where there is a misjoinder of counts, and the damages have not been severally assessed ; and judgment has been arrested absolutely in some reported cases. It was done in *Corbett v. Packington* (d), and judgment was reversed for a similar objection in *Herrenden v. Palmer* (d). No question appears to have been raised in either case as to the right or duty of the Court to award a venire de novo, and therefore none of these cases are decisive authorities upon this question. But the absence of any intimation in the cases or books (and we have not been able to find any) as to the power to grant a venire de novo in such a case, makes us pause before we adopt this proceeding. The difference between this case and that provided for by the rule of Court, and sanctioned by the decision in *Leach v. Thomas*, is slight ; still there is a difference in the principle, and we do not feel ourselves, in the absence of all authority, warranted in disregarding it.

A venire de novo can only be granted on what appears to the Court on record, and unless the record warrants it, it will be error to grant it ; and it proceeds (where the jury have been regularly summoned and impannelled) on a suggestion of their misbehaviour, *Lewis d. The Earl of Derby v. Witham* (e). Where there is an improper or defective verdict, on which, if perfect, the Court could give judgment, the jury have misconducted themselves, and the case of a general assessment of damages on a declaration, with a bad count or breach, may fall within this rule, for it may be presumed that the jury were instructed as to the law, and told to disregard the part of the declaration

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(a) Barnes's Notes, 478.

(b) Id. 480.

(c) Doug. 376.

(d) Hob. 88.

(e) 2 Str. 1185.

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which was not actionable, or to assess the damages severally ; and in such a case an award of venire de novo may be made "as on an ill verdict" to use the language of the old rule. In that case, the verdict, if good, and confined to the good count or breach, or capable of being applied to it, would at once authorize and require a verdict for the plaintiff, and the Court ex officio would be bound to award it, overlooking the bad count or breach. But where the counts are both good but misjoined, the jury ought to assess the damages on all the counts, as each is actionable ; and, but for the misjoinder, judgment might be given on each ; and if the damages had been assessed on each severally, that would have been of no avail, for the Court could not have given any judgment at all ex officio, and further acts of the plaintiff in releasing the damages on one or the other counts would be necessary. If indeed it were a matter of discretion in the Court to grant or refuse such a writ, it would admit of a question, whether it would not be reasonable to do it in order to enable the plaintiff to make an election, which he had omitted to make at the proper period before ; and in that case it would be fitting also to consider, whether he ought not to pay the costs of such a proceeding. But it is clearly a matter of duty on the Court to grant the writ or to refuse it ; an improper refusal is a ground of error, and it cannot well be error in the Court to refuse a writ, the granting of which would not necessarily enable the Court to give judgment one way or the other.

For these reasons we think that the rule must be discharged.

Rule discharged.

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WHITE v. HISLOP.

ASSUMPSIT for goods sold and delivered. Pleas, non assumpsit, and a set-off. The cause came on for trial before the under-sheriff of Yorkshire, when, the plaintiff having proved his case, the attorney of the defendant offered to give evidence in support of the plea of set-off. This, however, the under-sheriff refused to receive, when the defendant's attorney tendered a bill of exceptions, but the judge refused to put his signature to it. The plaintiff having obtained a verdict,

Where, on the trial of a cause, the under-sheriff declined to sign a bill of exceptions, the Court refused to stay judgment and execution.

W. H. Watson moved to stay the judgment and execution, upon an affidavit of these facts.

PER CURIAM.—The object of the writs of trial is to render the proceedings more convenient and less expensive, and it would entirely defeat that object if we were to allow cases such as this to be brought before a court of error. When a Judge at Nisi Prius refuses to sign a bill of exceptions, the party has a remedy by action at law.

Rule refused.

WICKENS v. COX.

THE defendant had obtained and served an order for particulars of the plaintiff's demand, which order required that all proceedings be in the mean time stayed. Afterwards, and before the particulars were delivered, the defendant served the plaintiff with a demand of declaration, at the bottom of which was a notice that he abandoned

The defendant obtained and served an order for particulars, which operated as a stay of proceedings. He afterwards demanded a declaration, and, at the

foot of the same paper, gave notice of his abandonment of the order:—*Held*, that judgment of non pros., for want of a declaration, was irregular.

Quære, whether an order which has been served can be abandoned by mere notice to that effect, without summons.

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his order for particulars. No declaration having been delivered, judgment of non pros. was signed.

V. Lee, having obtained a rule to set aside the judgment for irregularity,

Cowling shewed cause.—The party who obtains a rule or order may abandon it provided he has not acted upon it. In *M'Dougall v. Nicholls* (a), a judge at chambers had indorsed on a summons the minutes of an order, and the party taking out the summons refused to draw up the order, or to deliver up the indorsed summons, and the Court refused to compel him to do either, or to direct the judge's clerk to draw up the order from the minutes of counsel. [*Parke*, B.—There, the order had not been served, and till then, there is a locus pœnitentiæ. Here, the order is absolute for a stay of proceedings, and the question is whether that can be got rid of without a summons to set it aside.] *Kirby v. Snowden* (b) shews that the order for particulars may be used as a pretext for not proceeding with the action. The defendant served an order for particulars before declaration. After waiting three months, the plaintiff refused to go on with the action or to enter a stet processus, and the Court refused to compel him so to do. [*Parke*, B.—The defendant may get rid of the order by taking out a summons to set it aside. *Alderson*, B.—The Judge would perhaps make such an order ex parte.]

Lee, contra.—The case of *M'Dougall v. Nicholls* is clearly inapplicable, since there the order had not been served. Here, the notice of abandonment was at all events a nullity, as it was subsequent to the demand of declaration, being written at the foot of the same paper.

(a) 3 A. & E. 813.

(b) Ante, Vol. 4, p. 191.

PARKE, B.—The judgment was clearly irregular. The demand of declaration comes first, and then the notice of abandonment of the order. The defendant should, at all events, have given the notice first.

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BOLLAND, ALDERSON, and GURNEY, Bs., concurred.

Rule absolute.

COOPER v. WHITMARSH.

IN this case issue was joined on the 3rd of May, and notice of trial given for the sittings which were on the 12th. The venue was in London, and the defendant resided within forty miles. It appeared that the 12th of May was an adjournment day only until the 16th. Upon the 14th, the plaintiff gave notice of countermand. *Curwood* having obtained a rule to shew cause why the plaintiff should not pay the costs of the day, for not proceeding to trial pursuant to his notice,

Where notice of trial is given for the adjournment day, a notice of countermand two days prior to the day to which the Court adjourned, is too late.

R. V. Richards shewed cause.

PARKE, B.—The notice of countermand is clearly too late. The plaintiff must pay these costs.

Rule absolute.

COOK v. VAUGHAN.

MANSEL moved for a rule to shew cause why the bail-bond given in this case should not be delivered up to be cancelled on entering a common appearance. The objection was, that the writ of capias described the defendant as a "gentleman," but in the copy served on the defendant, this description was altogether omitted. It was submitted, that the 2 Will. 4, c. 39, s. 4, required an exact copy of the writ to be served on the party on whom the

Where the capias described the defendant as a "gentleman," but such description was omitted in the copy served, the Court ordered the bail-bond to be delivered up to be cancelled.

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process was executed, and that though it was not in strictness necessary to insert any addition in the *capias*, yet it having been inserted, it became a material part, and should have been retained in the copy.

Wordsworth shewed cause, and contended that where the copy was substantially correct, the Court would not set aside the proceedings for any trifling variance not affecting the sense, or calculated to mislead. *Forbes v. Mason* (a), *Cooper v. Wheale* (b), and *Sutton v. Burgess* (c).

PARKE, B.—In *Sutton v. Burgess*, the objection was not to the copy, but the indorsement on it, which contained words not required by the rule 2 H. T., 2 Will. 4. I remember at the time feeling considerable doubt whether the form prescribed by the rule was not incorrect, and whether the very words objected to, should not have been contained in it. However, the objection in the present case, arises from an alleged non-compliance with the statute, the requisites of which should be strictly pursued. I think this cannot be said to be a copy of the writ itself. It is true that the insertion of the word “gentleman” was not required by the act, but the writ is not vitiated by it, and the copy must contain all that the writ does.

ALDERSON, B.—*Smith v. Pennell* (d) is the nearest case to the present. There it was held that the omission of the word “London” in the indorsement on the copy of the *capias*, was a sufficient cause for setting aside the copy. Here, the addition cannot be rejected as surplusage, and it must therefore be retained in the copy. Otherwise you might insert some other word in lieu of “gentleman,” and contend that it would still be a copy.

Rule absolute.

(a) Ante, Vol. 3, p. 104.

(b) Ante, Vol. 4, p. 281.

(c) 1 C. M. & R. 770.

(d) Ante, Vol. 2, p. 654.

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CROWTHER v. ELWELL.

IN this case a verdict was found for the defendant on two of the issues raised, and he claimed to be allowed the costs of the witnesses in support of them. The Master required an affidavit that "they were material and necessary in support of those issues, and that their evidence did not apply in any degree to the issues found for the plaintiff." The defendant produced an affidavit stating that "although their evidence referred to a certain extent to the issues found against the defendant, still that the said witnesses were subpoenaed by the defendant principally and specifically with the view to support the issues found for the defendant, and that such witnesses, in the judgment and belief of deponent, spoke only generally, and not materially, to the issues found against the defendant." The Master considered this affidavit insufficient, and refused to allow the costs of those witnesses.

Where a defendant succeeds on some of several issues, he is entitled to the costs of the witnesses called *exclusively* in support of those issues, but not of those who were also examined to disprove the issues found for the plaintiff.

Lee moved for a rule calling on the Master to review his taxation, and referred to *Knight v. Woore* (a), in which it was held that a defendant is entitled to the costs of witnesses called to establish the issues on which he eventually succeeds, though they may also give evidence incidentally on the other parts of the case. The same principle was laid down in *Eades v. Everatt* (b).

ALDERSON, B.—I do not understand the meaning of the expression, that the witnesses were subpoenaed "specifically" with a view to the issues found for the defendant. In *Eades v. Everatt* it was sworn that they were subpoenaed "exclusively" for such issues. Besides, it does not appear that they were not examined in chief in

(a) Ante, Vol. 5, p. 487.

(b) Ante, Vol. 3, p. 687.

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support of the other issues, and if they were used to disprove any part which has been found for the plaintiff, how can the defendant be entitled to the costs of them? The only definite rule is that laid down in *Lardner v. Dick* (a), namely, that the defendant is not to be allowed the costs of witnesses called as well to disprove the issues found for the plaintiff as to prove those found for the defendant.

Rule refused.

(a) Ante, Vol. 2, p. 333.

FREEMAN v. CRAFTS.

A general plea of payment must be taken to be pleaded to the particular sum for which the action is brought: therefore, where the defendant pleaded that he had paid to the plaintiff sums amounting to the monies mentioned in the declaration; and it appeared that he had in fact paid such sums, but that the plaintiff went for a balance due beyond their amount:—
Held, that the plaintiff was entitled to a verdict, and that it was not necessary for him to new assign.

DEBT.—The first count stated that defendant was indebted to the plaintiff in 10*l.* for goods sold and delivered. Second count in 10*l.* for work and materials. Third count in 10*l.* for money due on an account stated. The defendant pleaded that before the commencement of the suit, he paid to the plaintiff divers sums of money amounting in the whole to a large sum of money, to wit, the amount of all the several alleged debts and monies in the declaration mentioned, in full satisfaction and discharge, &c. Replication, that he did not pay modo et formâ.

At the trial before the under-sheriff of Middlesex, the defendant proved the payment of sums equal to the amount mentioned in the declaration, but the claim being for a balance due after deducting the sums so paid, a verdict was found for the plaintiff, with liberty for the defendant to move to enter a verdict if the Court should be of opinion that the plaintiff ought to have new assigned.

Corrie now moved accordingly. The defendant having proved the payment of sums equal to the amount mentioned in the declaration, is entitled to a verdict upon these pleadings. If the plaintiff meant to rely upon a claim

beyond the amount paid, he should have new assigned. *Collins v. Aaron* (a) seems in favour of the proposition contended for: there, the plaintiff declared in assumpsit for goods sold, and in his particulars claimed 85*l.* due upon the balance of an account. The defendant pleaded payment of 333*l.* which had been in fact paid before the balance was struck; the plaintiff then obtained an order to amend his declaration by increasing the amount claimed, and the Court seemed to think such amendment necessary in order to enable the plaintiff to recover.

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LORD ABINGER, C. B.—Your plea means that you have paid the sum for which the action is brought, or it means nothing.

ALDERSON, B.—Look at the plea of license in an action of trespass; there, if the complaint is of several trespasses, and the plea is general, the defendant must shew a license co-extensive with the trespasses proved. So, under the plea of payment, you must shew a payment of the sum the plaintiff is going for. We have had occasion to consider the effect of a general plea of payment, and have come to the resolution of not allowing new assignments to such a plea.

Rule refused.

(a) 1 Arnold, 54.

HAYWARD v. GIFFARD and GROVE.

JERVIS had obtained a rule, calling on one George Spencer to shew cause why he should not forthwith pay to the defendants the amount of the costs taxed in this case, on a judgment as in case of a nonsuit, and also the costs of this application. The defendant Giffard, was clerk to the trustees acting under an act of Parliament for paving, lighting, and improving the district called Tot-

The Court will not order a stranger to the record to pay the costs of an action, although it appears from the affidavit, that he is substantially a party to it.

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hill Fields, and the defendant Grove, was a constable employed by the trustees, to make a distress for rates upon certain premises in the district, occupied by the plaintiff as tenant to Spencer. The present action arose out of an alleged wrongful distress. The affidavits stated a variety of facts for the purpose of shewing that Spencer was the real plaintiff, and not Hayward, and it was also alleged that Hayward was a pauper and had absconded.

Rogers shewed cause, and contended that there was no authority for making a person liable for costs, who was not a party to the record. The ordinary application for security for costs was in effect for a stay of proceedings, *Adams v. Brown* (a). The practice in ejectment affords no analogy, for that action proceeded entirely upon a fiction. In *Berkeley v. Dimery* (b), which was an action of trespass for breaking and entering the plaintiff's close, and cutting heath, &c., it appeared that the trespasses were committed by the direction of one Hill, but the Court refused a rule calling on Hill to shew cause why he should not pay the costs, and they observed that in ejectment, the tenant in possession must be sued, and that the Court would not permit a person to put a pauper into possession, merely to evade the costs.

Jervis and *Turner* contra, referred to *Blewitt v. Tregoning* (c), which was a similar application; and urged that though the rule was there discharged on account of the insufficiency of the affidavit, yet no question was raised as to the power of the Court to grant such an application.

LORD ABINGER, C. B.—If this question were to be determined on the general principles of equity, there can be

(a) 9 Bing. 81.

(b) 10 B. & C. 113.

(c) Ante, Vol. 5, p. 404.

no doubt that we ought to grant the rule. But courts of law have no authority over those who are not parties to the record, unless in the case of officers of their own courts, or when it is shewn that the party against whom the application is made, has been guilty of some crime or contempt. Even when an order is made in the cause, the immediate thing commanded is a stay of proceedings, by which means the ulterior object of a security for costs is obtained. So, in ejectment, the action is based upon a fiction, and the Courts take notice of the real party.

Rule discharged.

JONES v. SENIOR.

ASSUMPSIT.—The first count was on a bill of exchange, dated 20th of December, 1834, drawn by one J. Mabury upon and accepted by the defendant for 300*l.*, payable two months after date to the order of J. Mabury, and by him indorsed to the plaintiff. The second count was on a similar bill for 220*l.*, dated 24th of December, 1834. The first two pleas denied the indorsement by Mabury.

The defendant pleaded thirdly, that before and at the time of accepting the bills in the declaration mentioned, the defendant was indebted to the said J. Mabury in the sum of 807*l.*, and that the said bills respectively were accepted on account and in respect of 520*l.*, parcel of the

Assumpsit by indorsee against acceptor of two bills of exchange. Plea, that at the time of accepting the bills, the defendant was indebted to J. M. (the drawer), and that the bills were accepted in respect of parcel of the said debt: that before the bills became due, he (the defendant) was indebted to other persons, and, being embarrassed in his

circumstances, by an instrument in writing between J. M., the other persons, and defendant, after reciting that a proposal had been made that the defendant should pay his creditors a composition of 7*s.* in the pound, they, the said creditors, promised and agreed to and with the defendant, that after payment of the said composition, they would not sue, arrest, &c., the defendant for any debts then due to them from him, and that in case they should act contrary thereto that instrument might be pleaded in bar to any action. The plea then averred payment of the composition, and that J. M. paid to the plaintiff divers sums of money sufficient to discharge and satisfy all consideration whatsoever in respect of the indorsement of the said bills, and all sums of money due from J. M. to the plaintiffs on the bills, and all claims and demands of the plaintiff in respect of the said bills. Replication de injuriâ :—*Held*, that the plea was in effect in accord and satisfaction, and not in excuse, and therefore that the replication de injuriâ was bad on special demurrer.

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same debts: and the defendant further saith, that after the accepting, as in the declaration mentioned, of the said bills, and before the said bills or either of them became due and payable according to the tenor and effect thereof respectively, to wit, on the 10th of February, 1836, he, the defendant, was also indebted to divers other persons, to wit, (naming them), in divers sums of money, and then was embarrassed in his circumstances and unable to pay his debts in full, and thereupon the defendant being so indebted as aforesaid, by a certain instrument in writing then made by, between, and among the said J. Mabury and the said several other persons, of the first part; and the said defendant, of the second part; and bearing date on the day and year last aforesaid, and which said instrument was then subscribed as well by the said other persons, who then respectively set under thereunto and opposite to their respective names the respective amounts of their said respective debts, as by the said J. Mabury, who then set under thereunto and opposite to his name the said sum of 807*l.*, reciting, that the defendant was indebted to the several persons parties thereto, of the first part, in the several sums of money thereunder set opposite to their respective names, and that a proposal had been made by the defendant to the said several parties thereto, of the first part, and agreed to by them, that the defendant should, on or before the 1st of March then next, pay to the several creditors in the manner thereafter mentioned, a composition of 7*s.* on the amount of their said respective debts; and that the defendant should relinquish and transfer to and for the benefit of the said creditors certain claims of him, the defendant, upon certain mercantile houses in Great Britain and parts abroad, which composition of 7*s.* in the pound and transfer of such claims were to be in full satisfaction and discharge of the said several debts owing to the said creditors parties thereto, of the first part, as

aforesaid, who had agreed in consideration thereof to enter into and execute that instrument; and further reciting, that, by an indenture bearing even date therewith, the defendant had relinquished and transferred the said several claims to the said creditors parties thereto, of the first part, in consideration of the premises and of the said composition, the said several creditors parties thereto, of the first part, did thereby for themselves, severally and respectively promise and agree with and to the defendant, that, after delivery, on or before the first day of March then next, to the said several creditors, or one or more of them, for and on account of the rest of the said indenture bearing even date therewith, and payment on or before the said last-mentioned day, to the said several creditors parties thereto, of the first part, of the said composition of 7s. in the pound, on their said several debts, in manner following: namely, 5s. in the pound in cash, and 2s. in the pound by the defendant's acceptances, at six months' date, with a sufficient personal guarantee for the due payment thereof, and all which was to be in full discharge of the said several debts owing to them respectively by the defendant, they, the said several creditors, or any of them, their or any of their heirs, executors, administrators, principals, partners, or assigns, should not, nor would sue, arrest, attach, imprison, or prosecute the defendant, his heirs, executors, or administrators, or his or their lands or tenements, goods or chattels, or any of them, for or on account of any claims, debts, or demands whatsoever, then due to or claimed by them or any of them from the defendant; and that in case they or any of them, the said several creditors parties thereto, of the first part, their or any of their heirs, executors, administrators, or assigns, principals, partners, or assigns, should act contrary thereto, that instrument should be a full, absolute, and sufficient release and discharge of and for such accounts, claims, debts, and demands, and the

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defendant, his heirs, executors, and administrators, and his and their lands and tenements, goods and chattels should be for ever acquitted, released, and discharged therefrom; and that instrument might be pleaded in bar to any action or suit accordingly. And also, that they, the said several creditors parties thereto respectively, should and would, on tender or payment of the composition aforesaid, give and deliver to the defendant, his executors, administrators, and assigns, all bonds, bills, notes, and other securities, held by them, the said several creditors respectively, for or in respect of their said several debts, save and except any such, to which there might happen to be parties jointly or collaterally liable. And the defendant further says, that by a certain indenture, bearing even date with the said instrument in writing, and then made between the defendant, of the one part, and R. Saunders and J. Bishton, of the other part, and then sealed with the seal of the defendant, he, the defendant, assigned, relinquished, and transferred to the said R. Saunders and J. Bishton, the said claims of him, the defendant, upon the said mercantile houses in Great Britain and parts abroad, to and for the benefit of the said creditors parties to the said instrument in writing. And the defendant further says, that afterwards, and before the 1st of March, 1835, to wit, on the 10th of February, 1835, the defendant delivered the said indenture to divers, to wit, two of his said creditors, to wit, the said R. Saunders and J. Bishton, on account of the rest of his said creditors. And the defendant further says, that after the making of the said indenture in writing, and before the 1st of March, 1835, he, the defendant, at the request of the said J. Mabury, paid to a certain person, to wit, one W. Fellowes, for the said J. Mabury, 5s. in the pound on the said debt of the said J. Mabury, to wit, on the sum of 807*l.*, to wit, the sum of 201*l.* 15*s.*, and then, and before the said 1st of March, 1835, to wit, on the said 10th February, 1835, at

the like request also delivered to the same person for the said J. Mabury, his, the defendant's acceptance, with a sufficient personal guarantee for the due payment thereof, at six months' date, of 2*s.* in the pound on the said debt of the said J. Mabury, to wit, on the said sum of 80*l.*, to wit, for the sum of 80*l.* 14*s.*, whereof the said J. Mabury then had notice, and then was requested to deliver up to the defendant the said two bills in the declaration mentioned; and thereupon the said J. Mabury then requested, and the defendant, at the request of the said J. Mabury, then agreed that the said J. Mabury should have further time to procure and deliver up to the defendant the said two bills; and the defendant further says, that after the making of the said instrument in writing, and before the said 1st of March, 1835, to wit, on the said 10th of February, 1835, the defendant paid to the said several other creditors parties thereto, of the first part, the said composition of 7*s.* in the pound on their said several debts, in manner following: namely, 5*s.* in the pound in cash, and 2*s.* in the pound by the defendant's acceptances at six months' date, with a sufficient personal guarantee for the due payment thereof respectively, of all which premises the plaintiffs then had notice; and the defendant avers, that afterwards, and long before the commencement of this suit, to wit, on the said 10th of February, 1835, the said J. Mabury paid to the plaintiff, and he, the plaintiff, then received from and on account of the said J. Mabury, divers sums of money, in the whole amounting to a sum sufficient to discharge and satisfy all consideration whatsoever for or in respect of the said indorsement of the said bills in the declaration mentioned respectively, and all sums of money whatsoever then due from or by the said J. Mabury to the plaintiff in respect of the said bills or either of them, or otherwise howsoever, and all claims and demands whatsoever of the plaintiff in respect of the said bills or either of them, or otherwise on the said

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J. Mabury, to wit, the sum of 2,000*l.* in full satisfaction and discharge of the said bills, and of all claim and demand whatsoever in respect of them or either of them, or otherwise; and so the defendant says, that the plaintiff then became, and from thenceforth continued to be, and at the time of the commencement of this suit, were the holders of the same bills respectively, without any consideration whatever in respect of their being holders of the same bills, or either of them, or to entitle them to the security or benefit thereof, or of either of them, in anywise, and in fraud of the defendant and his said creditors.—Verification.

Replication de injuriâ, to which there was a demurrer and joinder.

The points marked for argument by the plaintiffs were, that the plea is ill because it does not allege that J. Mabury was holder of the bills when the instrument of composition was entered into, nor that the debt was discharged by the composition, nor that the plaintiffs were otherwise than bonâ fide holders for value; and because it must be taken that the payments by J. Mabury to the plaintiffs were before the bills fell due; and because it does not allege that J. Mabury paid the bills, but merely alleges that he paid them monies sufficient to pay them; and because it alleges an insufficient excuse for the nonpayment of the bills to the plaintiffs.

The defendant's points were:—That the replication is ill, because it purports to deny the excuse set up by the plea, when no excuse for nonpayment of the bills, when due, is alleged, and though the plea shews matter in discharge of an undenied liability and breach of promise to pay according to the tenor and effect of the bills and indorsement. Because it assumes, that the material matters of the plea are merely in excuse, although those matters do not, as pleaded, appear, nor are, by any matters alleged in the replication, shewn to be merely matters in

excuse. Because the defendant has, by his plea, shewn and claimed an interest in the bills, on which the action is founded, and because the replication is double and multifarious.

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Henderson, in support of the demurrer.—This is not a plea in excuse, but in discharge of an undenied liability. It is needless to cite authorities in support of the proposition, that unless the plea shews matter in excuse, the replication de injuriâ is inapplicable. That was clearly established in *Crogate's case* (a), and the law there laid down has been since recognised in several modern cases. Here, the plea in fact amounts to this, that the plaintiffs are not entitled to recover, because they have already received satisfaction from the drawer of the bill. [*Parke*, B.—One part of the plea seems to be matter of excuse, and the other accord and satisfaction: would the plea be good if all the matters about the composition were struck out?] Probably it would not, as the plea must shew that neither the drawer nor indorsee could sue; but then the plea goes on to state that the terms of the deed were complied with, which, as regards the indorsee, is mere matter of discharge. This case does not resemble *Isaac v. Farrar* (b). [*Lord Abinger*, C. B.—The plea shews that the plaintiff held the bills as a trustee for Mabury.] The plea does not deny the obligation to pay the bills when they become due, and the matter which has subsequently arisen, is clearly not in excuse, as it does not seek to purge the breach of promise. [*Lord Abinger*, C. B.—The plea does not aver that Mabury paid the plaintiff *after* the bills became due.] The plea expressly states, that Mabury paid the plaintiff the sum of 2,000*l.*, “in full satisfaction and discharge of the same bills, and of all claim and demand whatsoever, in respect of them, or either of them, or other-

(a) 8 Rep. 66.

(b) Ante, Vol. 4, p. 750.

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wise." That is a sufficient averment, that the payment was made after the bills were due. [*Parke, B.*—I think that averment shews the bills were paid after they became due.]

Channell, contra.—It is conceded, that the rule laid down in *Crogate's* case must govern this; but it is contended that this is not a plea of discharge. It consists of matter of excuse, and shews a cesser of all consideration on the part of the plaintiffs. Suppose the payment had been made during the time the bill was running, it would have been clearly matter of excuse: *Reynolds v. Blackburn (a)*. It is by no means clear, that the payment was made after the bills became due, but admitting that to be the fact, a payment by the drawer would not discharge the acceptor, who would be still liable at the suit of the holder for nominal damages. Where the effect of the plea is to destroy the consideration, or to shew that no consideration ever existed, that is a plea in excuse: *Isaac v. Farrar*. Here, a composition is made with the drawer while the bill is running, to which the plaintiffs are not privy. It was then necessary to go further, and destroy the consideration between the drawer and the plaintiffs. The effect of the plea is in excuse, it states facts which shewed that the plaintiffs continued to hold without consideration.

PARKE, B.—It seems to me, that this is in effect a plea of accord and satisfaction: there is nothing in the plea to shew, that the defendant was not liable to pay the bills when they became due. What, then, is the meaning of the plea? It is this, that Mabury has paid every thing in full. But it is said, that that alone will not do, as the plaintiffs might hold as trustee for Mabury, but unless there was

(a) Ante, Vol. 6, p. 19.

some agreement that the holder should retain the bills, he would not be in the situation of a trustee for the person who has paid them. The plea is in substance, this, that though I did break the contract, by not paying the bills when they became due, yet by what has subsequently taken place between the plaintiffs and Mabury, I am discharged from all liability. Whether or not, the plea would have been an answer to the action, if the last averment stood alone, it is not necessary to decide. That clearly is not matter of excuse. The plaintiffs may have liberty to amend.

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ALDERSON, B.—The plea is in discharge, and not in excuse.

Lord ABINGER, C. B., concurred.

Leave to amend.

REGINA v. Sheriff of CHESHIRE in GOACH v. ATKINSON.

CROMPTON shewed cause against a rule nisi, for setting aside an attachment against the sheriff, on payment of costs. He objected that the affidavit, upon which the rule had been obtained, did not comply with the rule of this Court of H. T., 7 Will. 4, which required that the affidavit should state the application to be really and truly made on the part of the sheriff or bail, "at his or their own expense, and for his or their indemnity only." In the present case the form of affidavit was, "for his *only* indemnity."

An application on the part of the sheriff on putting in bail, to set aside an attachment or stay proceedings on the bail-bond, must be grounded on an affidavit that such application is made "for his or their indemnity *only*."

Butt, in support of the rule, contended, that the meaning was substantially the same. Besides, the rule of the King's Bench, M. T., 59, Geo. 3, used the terms, "for

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his or their only indemnity," and that form was followed by all the books of practice (a).

PARKE, B.—The affidavit should follow the terms of the rule, and is, therefore, irregular; but under the circumstances, I think an amendment ought to be allowed. His Lordship then stated, that the rule of this Court was intended to be a transcript of that in the Queen's Bench, and suggested that a new rule should be drawn up. On referring, however, to the original rule in the Queen's Bench, it appeared, that the words there used were, "for his or their indemnity only," and that the rule had been inaccurately copied in the 2 B & Ald. 240, and from thence to the books of practice.

Amendment allowed.

(a) Tidd. 316; Archbold, 3rd edit., 147; Archbold's Practice of Country Attornies, 172.

HIAM v. SMITH.

In an action of debt the defendant pleaded several pleas, to one of which the plaintiff demurred, and issue was joined on the others. The plaintiff gave notice of trial before the sheriff, and that the jury would then assess the damages on the demurrer.

The award of venire contained in the issue was "as well to try the issues joined as to inquire what damages the plaintiff hath sustained by occasion of the premises whereof the parties have put themselves upon the judgment of the Court, if judgment should happen to be given for the plaintiff." These words were omitted in the writ of trial, and the plaintiff gave the defendant notice that he did not mean to assess the damages:—*Held*, that the variance was immaterial.

MILLER moved for a rule to shew cause why the issue delivered in this case, and the writ of trial should not be set aside for irregularity. The action was in debt on simple contract, and the defendant pleaded several pleas, to one of which the plaintiff demurred, and issue was joined on the others. The defendant received the issue with a notice of trial in the following form:—"Take notice, that the issues joined in this case will be tried before the sheriff of Middlesex at his office, &c., and the jury will then assess the damages upon the demurrer, in case judgment

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should be given for the plaintiff." The issue, after setting out the award of venire in the usual form, proceeded thus:—"And because it is unknown to the Court here, whether or not the defendant will be convicted of the premises whereof the said parties have put themselves upon the judgment of the Court, and because it is convenient and necessary that there be but one taxation of damages in this suit, therefore, as well to try the said issues above joined between the parties to be tried by the country, as to inquire what damages the plaintiff has sustained by occasion of the premises whereof the parties have put themselves upon the judgment of the Court, if judgment should happen to be given for the plaintiff, let a jury thereupon come." The above words were altogether omitted in the writ of trial. Subsequently, the plaintiff served the defendant with a notice, that he did not mean to assess the damages. The defendant protested against the irregularity of the proceedings: but the cause was tried, and the plaintiff obtained a verdict.

Miller contended that this case was not distinguishable from *Worthington v. Wigley* (a), in which it was held, that the omission to transcribe into the issue delivered, the dates of the pleadings, constituted a variance of which the defendant was entitled to avail himself after trial, and the roll made up, although the dates appeared upon the roll. That decision was considered and approved of by the Court of Common Pleas, in the case of *Blissett v. Tenant* (b). There, the date of the writ of summons was omitted in the issue and inserted in the writ of trial, and the Court considered the variance a sufficient ground for setting aside the trial. [*Alderson*, B.—That is a different case, the issue is required to be in a particular form, and is to begin with a recital of the writ of summons. Lord *Abinger*, C. B.—

(a) Ante, Vol. 5, p. 209.

(b) Ante, p. 436.

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The plaintiff has given you notice that he does not mean to assess contingent damages on the demurrer, then that statement must be considered as struck out of the issue.] *Blissett v. Tenant* shews that the plaintiff should have obtained a Judge's order to amend the issue. [Lord Abinger, C. B.—I am glad that I am not a party to that decision: such cases instead of facilitating justice are rather opposed to it.

Rule refused.

DOE d. HOLDER v. RUSHWORTH and Another.

The notice at the foot of a declaration in proceedings by ejectment pursuant to 1 Geo. 4, c. 87, s. 1, must require the tenant to appear on the *first day of term*, whether it is a country or a town cause.

MARTIN had obtained a rule, calling on J. Rushworth, the tenant in possession, to shew cause why, upon being admitted defendant he should not, besides entering into the common rule, and giving the common undertaking, undertake in case of a verdict for the plaintiff, to give him a judgment to be entered against the real defendant, of the term next preceding the time of trial. And also why he should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum, to be fixed by the Court, and within any time the Court should direct conditioned to pay the costs and damages which should be recovered by the plaintiff in the action; or why in default thereof, judgment should not be entered for the plaintiff, pursuant to the statute 1 Geo. 4, c. 87, s. 1.

It appeared from the affidavits that this was a country cause, and that the notice at the foot of the declaration, was in the following form:—"Take notice according to the form of the statute in such case made and provided, that you, and each of you, do appear *in next Trinity Term*, then and there to be made defendants in this action of ejectment, and then and there to enter into a recognizance by yourself, and two sufficient sureties, in such sum as the said Court shall think reasonable conditioned

to pay the costs and damages, which shall be recovered in this action, if the said Court shall so order."

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Platt and *Archbold* shewed cause. The notice is defective. The statute enacts, that the landlord may at the foot of the declaration, address a notice to the tenant requiring him to appear in Court "on the first day of the term then next following." Here the notice requires the defendants to appear in next Trinity Term. Even assuming the form of notice to be correct, the application is too soon, as the parties have all the term to appear. The act provides for cases of non-appearance, which of course must mean, according to the terms of the notice.

Martin.—The notice to appear is, in next Trinity Term "according to the form of the statute in such case made and provided." It must, therefore, be construed with reference to the statute, which requires the appearance to be on the first day of term.

PER CURIAM.—This notice does not follow the terms of the act. If this were a notice in a town cause, in a common ejectment, we are informed by the Master that it would be insufficient. This is a country cause, and though in such case the notice is general, still upon this proceeding, reference must be had to the statute. We think that the directions of the statute have not been complied with, and that the rule must be discharged.

Rule discharged.

COURT OF COMMON PLEAS.

Trinity Term,

IN THE FIRST YEAR OF THE REIGN OF VICTORIA.

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SCOTT v. STALEY.

Where, in an action of debt on bond for securing a sum of money, payable by instalments, there are no breaches alleged in the declaration; but the defendant, in his plea, sets out the conditions and alleges performance, to which, the defendant replies that money is in arrear, it is competent for the jury to assess the damages on that issue, under the statute 8 & 9 Will. 3, c. 11, s. 8, without a special award of venire.

CHANDLESS had obtained a rule, calling on the plaintiff to shew cause, why the judgment should not be arrested in this action, or why a venire de novo should not be awarded, on the ground that the award of venire, instead of being special, had been in the ordinary form. It was an action of debt on bond for securing a sum of money, payable by instalments. The plaintiff did not in his declaration assign any breaches, but the defendant pleaded setting out the conditions of the bond, and alleging performance. To this, the plaintiff replied, that arrears were due, and issue was joined on this, and a verdict was found for the plaintiff.

Barstow now shewed cause, and contended that this was not a case under the statute 8 & 9 Will. 3. c. 11. s. 8., in which breaches had been suggested on the roll, judgment having been given for the plaintiff on demurrer, or by confession, or nihil dicit, but the defendant having pleaded performance, and issues being raised upon the breaches, the case was the same as if they had been assigned in the declaration. Being of that nature, then they must be tried by the jury under the provisions of the first part of the section alluded to (a). The point had been al-

(a) 1 Taun. n., 57.

ready decided in the case of *Quin v. King* (a). The defect, if any existed, however, was aided after verdict by 8 Hen. 6 c. 12: *Welsh v. Upton* (b).

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Chandless contra, admitted that *Quin v. King*, was decisive, but contended that the Stat. 8. Hen. 6. c. 12, would not enable the plaintiff to construe a common venire, so that it should extend to the assessment of damages.

TINDAL. C. J.—We think that the case of *Quin v. King* is conclusive.

Rule discharged.

(a) 1 M. & W. 42.

(b) 1 Cro. El. 259.

STAPLES and Another v. HOLDSWORTH.

MAULE moved in Easter Term for a rule, calling on the plaintiffs in this action to shew cause, whereby an order of *Vaughan, J.*, allowing them to amend the particulars of demand, which they had delivered, should not be rescinded. It was an action of *assumpsit*, and had been commenced in the year 1827, when a declaration was delivered, containing counts for money had and received to the use of the plaintiff. A bill of particulars was also delivered, in which, money, to the amount of 7000*l.*, was claimed to be recovered, comprising various sums, alleged to have been received between the 2nd January, 1824, and the 19th January, 1827, and which were specified in an annexed schedule. No further step was taken in the cause, however, until the year 1836, owing to the absence of the parties from England, but then a term's notice be-

Assumpsit for money had and received to the use of the plaintiffs commenced in 1827, and a declaration and particulars of demand delivered, but no further step taken until 1836, when a term's notice was given, and a plea demanded and delivered, the Court subsequently allowed the particulars to be amended, it appearing that the defendant had been in a confidential situation in the employment of

the plaintiffs, and that their first particulars were framed on an account delivered by him, which was subsequently found to be incorrect.

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ing given, a plea was demanded and delivered (a). Application was subsequently made to *Vaughan, J.*, at chambers, by the plaintiffs for leave to amend their particulars, and an order granted, the plaintiffs desiring to increase the amount, which they sought to recover.

A rule, *nisi*, having been granted ;—

Wilde, Serjt., now shewed cause.—This rule could not be made absolute, because if it were, the effect would be depriving the plaintiffs of a right, which they clearly possessed. They did not propose to set up any new claim, but their only object was to include in their particulars various sums of money, which they were entitled to recover, and which had only been omitted in consequence of the misconduct of the defendant himself. Any attempt besides, which they might make to introduce a new cause of action must be futile, because the defendant would be at liberty, in accordance with the terms of the order which had been granted, to plead the Statute of Limitations. An affidavit was produced, in which it was sworn, that the defendant, in the month of August, 1823, had been employed by the plaintiffs, and having gone out to *Mexico*, was there placed in a confidential situation as their agent, and that while in that capacity he received the various sums of money which were now sought to be recovered. The only means which the plaintiffs possessed of ascertaining the amount of those sums, at the time of the commencement of the suit, was an account which the defendant had delivered, in obedience to their directions, and the original particulars were framed on that statement. Subsequently, however, on inquiry, they ascertained that there were various other sums, of which no account had been rendered, and it was with a view to the introduction of these into the particulars, that the order had

(a) Ante, p. 196.

been obtained. It was submitted, therefore, that this application would not be allowed to prevail.

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Maule and *Greenwood* in support of the rule.—The defendant, after the lapse of more than ten years, had a right to suppose that all claim as to these sums had been abandoned by the plaintiffs, and was justified in destroying his receipts and vouchers as to them. The real object of the order was to secure to the plaintiffs the means of recovering these sums of the defendant under cover of the old action, as any new suit in respect of them would be barred; but the attempt, it was urged, must be defeated. The rules with regard to such amendments as that here desired to be made, and as to bills of particulars were well defined and clearly laid down in many authorities. *Dawes v. Anstruther* (a), *Goff v. Popplewell* (b), *Steel v. Sowerby* (c), *Maddock v. Hammet* (d), *Duke of Marlborough v. Widmore* (e), *Doe d. Hardman v. Pilkington* (f), *Billing v. Flight* (g), *Brown v. Crump* (h), *Freen v. Cooper* (i), *Green v. Mitton* (j), *Holland v. Hopkins* (k), *Atkinson v. Bell* (l), and *Breckon v. Smith* (m) were all cases in point. Supposing the original demand to be abandoned, it could not be contended that the plaintiffs would be allowed to come in with fresh claims in respect of these new amounts, and recover them under the cover of the same action, because the new demand was perfectly distinct from that which was before made.

TINDAL, C. J.—All those cases which have been cited, where the Courts have refused to allow amendments to be

(a) Ante, Vol. 5, p. 738.

(b) 2 T. R. 707.

(c) 6 Id. 171.

(d) 7 Id. 55.

(e) Str. 890.

(f) 4 Burr. 2447.

(g) 6 Taun. 419.

(h) 6 Taun. 299.

(i) Id. 358.

(j) 4 B. & Ad. 369.

(k) 2 B. & P. 243.

(l) 8 B. & C. 277.

(m) 1 Ad. & El. 488.

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made, have been cases where the applications have been to amend the records by inserting counts, in some of which there were new causes of action about to be introduced, while in others the defendants would have been prejudiced by the application being granted. Those authorities, therefore, will not govern the Court in the decision which they will pronounce in this case, unless the amendment of a bill of particulars must be put on the same footing with the amendment of the record. It appears, indeed, to have been the basis on which the argument of the defendant's counsel rested, that the two cases were analogous, but I think that they stand on very different grounds, and that the Court in considering them is to be governed by very different views. If the introduction of a new count were to be allowed, when the Statute of Limitations could not be pleaded, it would be taking away from the defendant the benefit of that statute; and, therefore, there can be no doubt, that in all cases where such an application is made, it cannot be successful.

Now, here the plaintiffs have brought their action, and the Statute of Limitations is a plea to all demands prior to the suing out of the writ, by which it is commenced, but if we were to yield to the principle attempted to be established, we should say that the statute ought to be interpreted, not in reference to the time of the action being brought, but to the time at which the plea was delivered—giving a different effect, therefore, to the operation of that statute. I am of opinion then, that where an application is made to amend particulars, in which the plaintiff has a right to put his claim on the record, we should only consider whether it is an equitable and reasonable application to the Court. There are many cases, in which it would be most injurious to refuse such applications—as, for instance, the plaintiff might turn over too many leaves of his ledger, in which it might be improper not to allow him to amend. Again, supposing the defendant, by his misconduct, has

kept back any real set of circumstances, which the plaintiff afterwards discovers, is it to be said that the plaintiff is not to be able to set right any error into which he may have fallen in consequence? Without imputing to the defendant here, therefore any intention to deceive or mislead the plaintiffs, the ground of application is stated in the affidavit, and the truth of it is not denied to be, that the plaintiffs only shaped their first bill of particulars from the accounts which they had received from the defendant himself, and that on investigation it was found that that account contained considerable errors, and that other sums of money had come to his hands, which, if they had been discovered at first, would have been included in the particulars.

There is no reason, consequently, why, in justice, the plaintiffs should not be allowed to amend, and the rule for setting aside the order of the learned Judge must be discharged.

PARK, J.—I am of the same opinion; and I will content myself with saying, that if the Court had done that which the defendant required us to do, we should have admitted that we had been acting in error for many years, during which we have been in the habit of making these orders. It has been the practice, that when the bill of particulars first delivered was incorrect, the party might amend, on payment of costs, and with leave of the Court; and the convenience of the rule is, besides, that if the bill of particulars delivered shall not be sufficiently explicit, the other party may come to the Court and have it amended; and in the 870th page of Mr. Archbold's Practice, by Chitty, there is a whole string of cases to that effect.

VAUGHAN, J.—I am also of the same opinion. This case has been argued on the supposition, that it is

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analagous to that of introducing a new count, which, however, it does not resemble. The plaintiffs, it appears, are much in the hands of the defendant, and when they call upon him to deliver in an account, they suppose that he delivers a correct one, and on that, they make out their particulars of demand. They afterwards find out, however, from various circumstances, that it is not a true account; and, therefore, that their particulars will not meet the case. The action being the same, then the simple question is, whether the plaintiffs should not be allowed to amend? When the parties came before me, it was argued that it was a new cause of action, which was sought to be introduced; but then it was answered, that if such were the case, it might be met with the Statute of Limitations. I think, therefore, the rule must be discharged.

COLTMAN, J.—There is a fact in this case, which weighs much with me, if it is true, which is that there were matters not discovered by the defendant, which should have been disclosed by him. He was placed in a situation of confidence, and he was bound to return a faithful and a true account to the plaintiffs. Without imputing fraud to him, it is stated that matters, which he should have brought forward, did not appear, and to that, there is no answer made.

It appears to me, therefore, that under the circumstances, we should be doing injustice if we did not allow this amendment to be made.

Rule discharged.

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KENNEDY moved for a rule, calling on the plaintiff to shew cause, why the verdict found for him in this action should not be set aside, and a nonsuit entered. It was an action on the case for a trespass, in obstructing a way, and the cause was tried before *Tindal*, C. J., at Kingston; when a question arose upon the 179th section of the Private Act, the 5th Will. 4, c. 10, whether the defendants were entitled to a notice of action. The company were incorporated by that statute, and the clause in question provided "that no action, suit or information, nor any other proceeding of any nature whatsoever shall be brought, commenced, or prosecuted against any person, for anything done or omitted to be done in pursuance of this act, or in the execution of the powers or authorities, or any of the orders made, given, or directed in, by, or under this act, unless twenty days' previous notice in writing, shall be given by the party intending to commence and prosecute such action, suit, information, or other proceeding to the intended defendant." It was submitted on the part of the plaintiff, that the word "person" being used in the statute, it could not be taken to include the company, while on behalf of the defendants, it was urged that the act was passed for their especial benefit, and that the intention of the legislature, therefore, was, that they should be included in this provision; and that, this view was borne out by a variety of provisions in other clauses. The Chief Justice allowed the cause to proceed, and a verdict having been returned for the plaintiff, leave was given to make the present motion. It was now contended, that the verdict must be set aside. With regard to the signification of the word "person" there were many authorities to shew that the construction here sought to be put upon it by the defendants, was the right

Where, in a private act of Parliament, it is provided that no action shall be commenced "against any person" for any act done in pursuance or by the authority of the statute, unless 20 days' previous notice in writing shall have been given to the intended defendant:—
Held, that this provision would apply to the company for whose benefit the act was passed, as well as to a single individual.

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one. In Co. Litt. (a), it was laid down, that "persons capable of purchase were of two sorts: persons natural, created of God, and persons incorporate or politic, created by the policy of man, and therefore they are called bodies politic," and 2 Bl. Com. p. 291, was an authority to the same effect. By the statute of Mortmain (7th Ed. 1.) it was provided that "no person religious or other, whatsoever he be, that will buy or sell any lands or tenements, or under the colour of gift or lease, or that will receive by reason of any other title, whatsoever it be, lands or tenements, or by any other craft or engine, will presume to appropriate to himself, under pain of forfeiture of the same, whereby such lands or tenements, may anywise, come into Mortmain;" and this not only included corporations sole, but aggregate. The statute, 21 Hen. 8, c. 13, s. 5, rendered it illegal for any "spiritual person" to buy to sell again any merchandise, &c., and the 22nd Hen. 8, c. 5, was passed, to procure the proper repair of bridges and highways, and power was given to the justices to tax "every inhabitant," and both statutes had been held to apply to and include corporations.

A rule nisi having been granted,—

Platt and Channell shewed cause.—The observation in Co. Litt. did not authorise the argument, that the word "person" would include a corporation. The question here was the sense in which the word "person" must be understood, standing by itself, and although in common parlance, a rose artificial, or artificial rose, would consist in any thing intended to resemble and represent a natural rose; yet taking away the word "artificial," the word "rose" would not properly describe the object. So, in all the authorities cited, where the word "person" had been held to include a corporation, it was always accompanied by some other word, descriptive of the meaning which it

(a) 2, A.

was intended to bear, and which made it a distinct appellation. As a general proposition, therefore, the word "person" could not be taken to comprehend a corporation in its meaning. There were sections in this act, calculated to explain the word person as here used, and to give it a signification different from that which it was sought to put upon it. When the law intended to allude to and point out bodies corporate, they were referred to specifically, and the question was whether, when they were intended to be described, they should not be distinctly mentioned. All acts which restrained the common law, ought themselves to be restrained; *Ash v. Abdy* (a); and, therefore, no favourable construction to the defendants should be put upon this statute, as it was in derogation of the common law right. In the Statute of Mortmain, the word "person" was connected with the word "religious," which gave it a descriptive character, and it was there intended to include both corporations and individual persons, because either might offend against the statute. Next, with regard to the clauses on which it was intended to rely, in support of the construction sought to be put upon the word. It had been contended that, in the 155th clause, the word "person" must be held to include the company, or else the exception immediately following would be a nullity; but all the acts done under the act must be done by individuals although members of the company. In other sections to imprison offenders power was given, but it could never be said that the company could be imprisoned. Against this construction, besides, there were a great many sections throughout the act, where the words "persons or corporations" were used in contradistinction, and where if the word "party" was employed, it was followed by some explanatory term, so as to include or exclude persons, indi-

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viduals, or corporations. Therefore, as this distinction was found to be drawn, and as the word "party" was used so as not to include company, the inference was that "person" standing alone meant an individual. Sections 1, 3, 8, 26, 32, 35, 36, and 41 would all support this view, and the latter was exceedingly important, as it afforded an instance of the care with which the distinction was drawn, between the natural sense of the word "party," and the meaning which was occasionally given to it. In numerous other clauses, the same care was taken. With regard to the interpretation clause, it appeared to have been adopted on the same principle, as that in the Fines and Recoveries Act (3 & 4 Will. 4., c. 74,) in order to save the introduction of many words. It provided, "that where in this act any words shall be used, importing the singular number or the masculine gender only, such words shall be understood to include several matters as well as one matter, several persons as well as one person, and females as well as males, and where the word corporation shall be used, the same shall be understood to mean any body politic or corporate, or collegiate, civil or ecclesiastical, aggregate or sole, unless in any of the cases aforesaid it be otherwise specially provided, or there be something in the subject or context repugnant to such construction." By this clause, therefore, the defendants were not assisted at all, and as they were entitled to no assistance or favour at the hands of the Court, the rule must be discharged. *Scales v. Pickering* (a) was an authority which fortified the doctrine, that where any legislative enactment was obtained to enable a company to carry on any speculation, they were protected to a certain extent only, and *Best*, C. J. there said, "if the words of the statute be ambiguous, every presumption is to be made against the company, and in favour of private property."

(a) 4 Bing. 448.

Wilde, Serjt., and *Kennedy*, in support of the rule, cited *Cortis v. The Kent Waterworks Company* (a), and were stopped by the Court.

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TINDAL, C. J.—It appears to me, that, on the proper construction to be put upon the 179th section of this act of Parliament, the company are within the protection there specified. I am well satisfied by the course of argument which has here been pursued, that the word “person,” in many parts of this act, cannot include “company,” while in many other parts it has an opposite intendment; but here, it can only mean the company. The question which is for decision, is not so much what is the precise meaning of the word “person” in this act, but whether it is used in a qualified sense in the 179th section, as if the action had been against one person only, and not the company. It is not a clause which empowers any thing to be done. If it did so, we must look at the interpretation clause, and see what is the meaning intended to be conveyed by the legislature by the word “person;” and although that clause has given us the sense in which that word is to be taken, still it is not necessary to hold that in any particular clause it shall have that specific meaning only. Now, let us look at the clause, and see what it is intended to enact. It begins by saying, “that no action, suit, or information, nor any other proceeding of any nature whatsoever, shall be brought, commenced, or prosecuted against any person for any thing done in pursuance of this act, or in execution of the powers, or any authority, or any of the orders made, given, or directed, in, by, or under this act, unless twenty days’ previous notice in writing shall be given by the party intending to commence and prosecute such action, suit, or information, or other proceeding, to the intended defendant.” Now, it is clear that

(a) 7 B. & C. 314.

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the company of proprietors come within that description, "the intended defendant," and so it goes on to the end of the clause, to use no other word for any person standing in the situation of defendant, but the word defendant, which will refer to all. Then the 180th clause begins with the words, "No plaintiff shall recover in any action for any irregularity, trespass, or other wrongful proceeding made or committed in the execution of this act, or in, under, or by virtue of any power or authority hereby given, if tender of sufficient amends shall have been made by or on behalf of the party who shall have committed such irregularity, &c., before such action brought; and in case no tender shall have been made it shall be lawful for the defendant in any such action, by leave of the Court where such action shall depend, at any time before issue joined, to pay into Court such sum of money as he shall think fit, &c." It is impossible not to see that if the company are to be excluded from the benefit of this clause, the very persons above all others who stand most in need of protection, are those who cannot avail themselves of it.

It is obvious that the safest course for the plaintiff would have been to give the notice, and he cannot complain of his being taken by surprise. Without impugning any of the arguments as to the common law meaning of the clause, I think that with regard to the 179th and 180th sections they are in *pari materiâ*, and that we should not follow out the manifest intentions of the legislature if we did not interpret the words, "against any person," in the former as applicable to the present defendant.

PARK, J.—I am of the same opinion.

VAUGHAN, J.—It can be matter of little surprise, that, in an act of 206 sections, there are many clauses in which

words are introduced, which have a sense in some of them which does not belong to them in others; but it appears to me, that the plain and obvious construction to be put upon this clause is, that it refers to the company, for, the legislature could never have intended to deprive them of the benefit of a section framed for their especial protection. If we give credit to the legislature for great accuracy of expression, I fear we shall not find it entitled to such credit. Now, in this clause, if you merely strike out the words, "against any person," it is obvious that the "intended defendant" is referred to, for the clause subsequently goes on to make enactments in his favour. So, then, it is quite clear, that the persons, of all others, who are likely to want the benefit of the act, are the company. Then, in the next section, the word "person" is entirely omitted, so that I think the construction which the Lord Chief Justice has put upon this clause is the correct one.

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COLTMAN, J.—We are bound, if we can, to see the intention of the legislature in this clause, and to give it that meaning which it was intended to bear at the time of its passing. Now, the difficulty on this section arises on the interpretation clause, which was intended to throw some light upon the construction to be put upon the act. It is to be observed, that it is wholly affirmative in its nature, and it says, that the word "person," shall extend to a variety of cases, not strictly within it, and in like manner that the word "corporation" shall extend to a variety of classes, which the framer of the act seems to have thought would not be necessarily implied. The effect of it therefore, is, that all the words must be carried to the full extent of the interpretation clause, in the construction to be given them, but it does not follow that they are to be confined to that. You must give them that extension; but it does not follow, that where you find the word used in the act you are to give it a negative and restrictive sense. Now,

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there being no reason here, why the company should not be protected, we are doing no violence to the proper meaning of the act by putting this construction upon it.

Rule absolute.

SMITH v. CAMPBELL and Another.

Where a copy of a rule nisi has been sent in a letter by post to a defendant resident in the country, together with the original rule, and the letter is received back, indorsed, "received a copy of the within rule," and that indorsement is signed by the defendant, it will be deemed sufficient service.

BERE moved to make a rule absolute on an affidavit of service. The deponent stated, that on the 28th May he wrote a letter to the defendants, who were resident in the country, and inclosed the original rule which had been granted by the Court, together with a true copy of it, and that he despatched the letter through the General Post-office, addressed to the defendants: that on a subsequent day he received the original rule back by post from the defendants, with the indorsement upon it, "Received a true copy of the within rule," signed "John Campbell and Duncan Campbell," the two defendants in the action. It was submitted that no cause being shewn, the rule must be absolute.

TINDAL, C. J.—That will do. There can be no doubt of the rule having reached their hands.

Rule absolute.

REYNOLDS and Another, Assignees, v. WEDD.

A. committed an act of bankruptcy on the 9th September, and on the 13th he was arrested on process issued

IN Easter Term,

Balguy moved for a rule calling on the defendant to shew cause why the nonsuit entered in this action should in an action commenced in the Boston Court of Requests to recover 420*l*. on a contract entered into on the 5th, and pursuant to which goods were delivered on the 7th of the same month. He deposited the amount indorsed on the writ in the hands of the sheriff, and it was paid into court, but without the additional 10*l*. for costs (under the statutes 43 Geo. 3, c. 46, s. 2, and 7 & 8 Geo. 4, c. 71, s. 2); and, on the 23rd, the plaintiff in the action obtained an order for the payment of the money out of court to him, and was then informed of the act of bankruptcy. A fiat was issued on the 28th, and assignees were appointed; and in an action by them to recover back the 420*l*., as money had and received to their use:—*Held*, that the payment out of court was by compulsion of law, and that they were not entitled to recover.

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not be set aside, and a verdict entered for the plaintiff, with 420*l.* damages. It appeared that the plaintiffs were assignees of one Shepherd, a bankrupt, and the present action was brought to recover a sum of 420*l.* alleged to have been received to their use by the defendant, to which there was a plea of non assumpsit. At the trial it was proved that Shepherd, on the 5th of September, 1837, before his bankruptcy, had contracted with Wedd for the supply of a quantity of goods, which were delivered to him accordingly on the 7th of the same month. On the 9th he committed an act of bankruptcy; on the 10th an application was made to him for payment for the goods, which was not successful; on the 13th he was arrested on process sued out of the Boston Court of Requests; and he then paid the sum of 420*l.* into the hands of the Mayor of Boston in lieu of bail, under the statutes 7 & 8 Geo. 4, c. 71, s. 2, & 43 Geo. 3, c. 46, s. 2, but he neglected to deposit the necessary sum for costs; and on the 23rd an application was, in consequence, made to the Court, that the money should be paid over to Wedd. The application was opposed, and the latter was then informed of the act of bankruptcy, but the money was, nevertheless, ordered to be paid over to him. On the 28th of the same month the fiat was issued, and the plaintiffs in the present action were appointed assignees in the usual manner. The present action was brought by them to recover the 420*l.* paid to the defendant, and it was contended that the money was legally the property of the assignees at the time of the order of Court being made, and the cases of *Balme v. Hutton* (a), and *Garland v. Carlisle* (b), were cited. On the part of the defendant, however, it was submitted that the payment was made by compulsion of law under an order of a court of competent jurisdiction, and the case of *Belcher v. Mills* (c) was cited. There, A., on being ar-

(a) 9 Bing. 471.

(b) 4 Bing. N. C. 7.

(c) 2 C. M. & R. 150.

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rested, gave a bail-bond to the sheriff, but did not perfect bail, by which the sheriff became fixed. Proceedings having been taken on the bail-bond, a Judge at chambers made an order, on an application by the bail, that proceedings should be stayed on payment of the debt and costs, which were accordingly paid by A.'s attorneys on the 27th October. A. had supplied his attorneys with a sum of money towards the payment of the debt and costs on the 10th of October, and on the 14th he became bankrupt. It was held, on this state of facts, that the payment was made under a process of law, and that the assignees of A. had no right to recover the money back from the party to whom it was paid. *Park, J.*, who tried the cause, nonsuited the plaintiffs, but gave them permission to move for a rule such as that for which application was now made.

A rule nisi having been granted,

Wilde, Serjt., Humfrey, and Waddington, shewed cause.—The nonsuit was rightly entered, and if the Court should now set it aside, the effect of their decision would be to deprive a plaintiff of all remedy against the bail or the sheriff. The defendant had no notice of the act of bankruptcy having been committed, and it was not until he came with his rule to take the money out of court, that he was informed of it. The money was paid into court in lieu of bail, to abide the event of the suit, and not the solvency or insolvency of the party. The case was, in effect, decided by *Belcher v. Mills*, which was a very strong authority, because there, the payment was after the fiat. *Ferrall v. Alexander* (a) was also an authority for the defendant, as there, the party lost no remedy, but here, he would. *Hannah v. Willis* (b) also established that

(a) Ante, Vol. 1, p. 132.

(b) Ante, p. 417.

the money had been properly paid to the defendant. It must be taken that that which was done by a court of competent jurisdiction was done properly, and the money here was paid under a process of law, properly issued in pursuance of an act of Parliament. The defendant had acquired a right to the money, so soon as a default was made by Shepherd, and would therefore be entitled to recover it; and this being a payment under pressure of law, it was protected: *Prin v. Beal* (a), *Pym v. Benson* (b), *Jones v. Lingard* (c); *Holmes v. Wennington*, cited in a note to *Cox v. Morgan* (d), and the case of *Cox v. Morgan* itself, is strongly in favour of the defendant: *Foster v. Allanson* (e.) The whole of these cases went to shew that payment obtained by force of legal pressure entitled the party to retain the money against an act of bankruptcy, and it was immaterial whether the payment was obtained by means of an action, or by motion: *Hovil v. Browning* (f), *Harwood v. Lomas* (g), *Southey v. Butler* (h), *Phillips v. Hunter* (i), *Allanson v. Atkinson* (k), *Teale v. Younge* (l), *Moses v. Macferlan* (m), and *Mariott v. Hampton* (n), were also referred to.

Balguy, Talfourd, Serjt., and N. Clarke, in support of the rule, contended, that as a general rule it must be admitted that the property of a bankrupt vested in his assignees by relation to the act of bankruptcy. The money paid to the defendant in this case, was therefore the property of the plaintiffs as assignees, and was vested in them after the ninth September. In the cases of *Balme v. Hut-*

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(a) 3 Keb. 231.

(b) Freeman, 349.

(c) Cited 5 T. R. 201.

(d) 2 B. & P. 398

(e) 2 T. R. 479.

(f) 7 East, 154

(g) 11 Id. 127.

(h) 3 E. & P. 237.

(i) 2 H. Bl. 402.

(k) 1 M. & S. 583.

(l) 1 M'Clel. & Y. 497.

(m) 2 Burr. 1005.

(n) 7 T. R. 269.

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ton, and *Garland v. Carlisle*, the sheriff had been held liable, although he acted under legal process. The title of the assignees at all events must be held to accrue from the time of notice of the bankruptcy being conveyed to the defendant, and that was shewn to have been before the money was paid to him, for it was a ground of opposition to the order being made. The defendant therefore in accepting the money, did so at the risk of an action. The case of *Ferrall v. Alexander*, so far from being an authority for the defendant, was distinctly in favour of the plaintiffs. It was there held, that money paid into court to abide the event of a suit, under 7 & 8 Geo. 4. c. 71. s. 2., was not a payment to a creditor within the protection of the 6 Geo. 4. c. 16. s. 82; and if paid in after an act of bankruptcy, and less than two months before a commission issued, it was not within the protection of 6 Geo. 4. c. 16. s. 81. The title of the assignees to the money was then admitted by Mr. Justice *Littledale*, and he expressed himself of opinion, that the payment out of court under the circumstances could not be considered as a payment to a creditor under the 82nd section of the statute.

TINDAL, C. J.—My opinion as to this case is, that it must be considered precisely on the footing on which it has been placed, namely, whether it falls within the general rule, by which all payments after the act of bankruptcy are avoided by relation to the act itself, or whether it is to be considered as within the exception—a payment under the sanction of a court of law.

Now, Shepherd became a bankrupt on the 9th September, and an action having been brought against him on the 13th he pays the money into court. He makes default in one of the requisites of the act, in omitting to pay 10% into the hands of the proper officer for costs, under 43 Geo. 3. c. 46. s. 2, and immediately afterwards the plaintiff in the action below, who is the defendant here, applies to

the court at Boston, and receives an order, that the money shall be paid out to him, and the question is, whether the money paid out to him under that order is recoverable in an action by the assignees, for money had and received to their use. Now, it appears to me, that this strictly ranges itself as money paid by the authority of the court under the act, and that the court was bound to exercise its power under the statute, and had no option, but to do that which it did. Under the 43 Geo. 3. c. 46., the court was directed by the 2nd section, after provision being made for the payment of money into court, in case the defendant shall not duly put in and perfect special bail, by its order, to direct the money so deposited to be paid over to the plaintiff in the action, upon motion to be made for that purpose. Then, at the moment of time when this application was made to the Boston court, there was no person in existence, except *Wedd*, who could claim the money. There was no fiat, nor were there any assignees, and although an act of bankruptcy had been committed, it did not follow that there would ever be a fiat. Therefore, at that period of time, the plaintiff below was the only person who could demand the money. Then this court has gone so far as to say that where the money is paid by a court of competent jurisdiction to a plaintiff, it is received by him in satisfaction of the debt, and it is a close of the transaction. That was decided in *Hannah v. Willis*, which was much considered. It is to be observed also, that by the course this transaction has taken, the plaintiff has lost all the benefit of recovering against the bail, which he could have had, if the case was in the ordinary course, or against the sheriff. The money therefore has been paid under the authority of a court of competent jurisdiction, and it was an act compelled by the statute, and over which the court had no power.

With regard to the case of *Ferrall v. Alexander*, it may be distinguished from this. In that case, neither the plain-

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tiff nor the defendant had any right to demand the repayment of the money out of court. The plaintiff could not, because the application was made after verdict and before judgment, and there had been no default on the part of the defendant. He had paid in the money which the statute 7 & 8 Geo. 4. c 71. required, and the plaintiff had no right to go and ask for it, until final judgment had been obtained. Now, the defendant in that action had become bankrupt, and assignees were regularly chosen, and therefore he had no right to go to the court, and therefore the court, when application was made to them, according to the judgment of Mr. Justice *Littledale*, seems to have said, that, as under the circumstances the defendant had no right to ask for the money, the court must exercise its equitable jurisdiction, and give the money to the assignees. Here, the party was in a condition to come to the court below, and to call on it to exercise its statutable authority. I think, therefore, the case is distinguishable from *Ferrall v. Alexander*, and that it falls clearly within the decision in *Belcher v. Mills*. Indeed, that case is stronger than this, when the facts are looked at: the bankrupt had given his attorney money on the 10th October to settle the action: on the 14th, a fiat is issued against him; and on that day the attorney still has the money in his hands. The parties go before a judge, and an order is made for staying proceedings, on payment of the debt and costs on the 27th of the same month, and on that day the money was accordingly paid over to the plaintiff or his attorney. Then the party was completely a bankrupt, and that being one of the ordinary modes of terminating a suit, and it being held that such a payment of the debt under the authority of the court, was a final termination of the suit, and operated to protect the party as money paid under the process and authority of the court, I do not feel disposed to overturn that authority. The rule, therefore, for setting aside the nonsuit must be discharged.

PARK, J.—I am not at all prepared to say, that this case was not of considerable importance; but I was of opinion at the trial, where, as well as here, the case was exceedingly well argued, as I now am, that the assignees have no right to recover this money, and that I was bound to nonsuit the plaintiffs; at the same time allowing them to come to the Court in order that they might have an opportunity of setting aside my decision if it was wrong. The case now resolves itself into a plain question, and the decision in *Marriott v. Hampton*, when we apply the principle of it to this act, carries us through in our judgment. There, the Court decided, that where money was paid by a plaintiff to a defendant, under legal compulsion, he had no right to recover it back, although it had been discovered that it was not due. Let us see, now, what the act says in this case. It provides that persons arrested on mesne process, instead of giving bail, may deposit with the sheriff the sum indorsed on the writ, with 10*l.* to answer costs, and that the sheriff shall, in every such case, pay the total sum so deposited with him into Court. Then, is the money to remain in Court for ever? No: the defendant may get it back on putting in and perfecting his bail; and it is enacted, that in case he shall not do so, the money may be paid over to the plaintiff, on motion made for that purpose. Then, here the money is paid into Court, and the defendant, by the course he pursues, seems to say that he does not mean to defend the action. If, after he had been arrested, he had paid the party the money, would it not have been a payment by compulsion of law? It would, beyond all doubt; and the money could not have been recoverable back again. Well, then, here it is paid into Court, under compulsion of law, in the first instance, and the Court had no discretion, on motion being made, but to pay it over to the plaintiff in the action; and here it appears that it was so paid, that it was a payment under an order made by a competent jurisdic-

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tion, and it was by legal compulsion, and no fraud can be suggested ; and, therefore, the case not only comes within the authority of *Belcher v. Mills*, but it is not nearly so strong as that, for there, the money was not paid over until fourteen days had elapsed after the commission had issued against the bankrupt.

VAUGHAN, J.—I am of the same opinion, that this non-suit was very properly directed. I entertain a decided opinion that this is a payment under a process of law, and that it was ordered by a court of competent jurisdiction, and I think the cases of *Belcher v. Mills* and *Marriott v. Hampton* are decisive upon the subject. In *Phillips v. Hunter*, the concluding sentence of the judgment of *Eyre*, C. J., is, “ My last proposition is, that upon a judgment recovered and executed, which, for the sake of argument, I suppose ought not to have been recovered, an action for money had and received will not lie for any body, not even for the person against whom the judgment has been so unjustly recovered.”

COLTMAN, J.—It is impossible to draw a distinction between this case and *Belcher v. Mills*, and I see no sufficient reason for doubting the propriety of the decision in that case. The rule must therefore be discharged on its authority.

Rule discharged.

DOE d. EMERSON v. ROE.

Service in
ejectment on
the son of the
tenant in pos-
session on the
premises, is in-
sufficient, un-
less it be shewn
that he is living

M*MARTIN* moved for judgment against the casual ejector. There were two tenants in possession, and the affidavits on which he moved stated, that the deponent had effected service on both of them, by leaving true
with his parent, and composes part of the family.

copies of the declaration with their respective sons on the premises in dispute. This it was submitted was sufficient.

TINDAL, C. J.—The sons may not live with their parents, but might be on the premises casually. Service on the wife of the tenant has been held good, because it is to be supposed that she is resident with her husband; but in order to make service on the son good, it should be shewn that he lives with his father, and composes part of the family. I think you have not even made out a case for a rule nisi.

Rule refused.

STEVENSON v. UNDERWOOD.

THIS was an action of assumpsit, by the drawer against the acceptor of a bill of exchange, for 46*l.* payable six months after date, and the declaration contained counts on the bill, for money had and received, and on an account stated.

The defendant pleaded as to the first count, that he was unlawfully imprisoned by the plaintiff, and was detained until by duress he was forced to accept the bill, and further, that he never had any value for the said bill; to the second count he pleaded non-assumpsit; and to the third count he pleaded a plea similar to that which was on the record as to the first count. The plaintiff demurred to the first and third pleas.

Hoggins, in support of the demurrer, contended that the pleas were double, as they alleged want of consideration, and duress of imprisonment.

Mansel contra.—The pleas were not double, and they would not have been complete with the mere allegation of

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A plea to an action on a bill of exchange, alleging that the bill was obtained by duress, and that it was without consideration, is bad for duplicity, although the latter defence is badly pleaded.

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duress. A plea could not be considered double, unless it contained allegations of two distinct matters, each of which would be an answer to the action. But duress did not vitiate the instrument *ab initio*; it did not render it void, but only voidable (a). If the want of consideration alone had been pleaded, the plea would have been bad. *Easton v. Pratchett* (b), *Noel v. Rich* (c). The plea must be taken distributively, and if duress only were pleaded, and the plaintiff replied not admitting it, it might be doubted whether, if there was value proved, it would be a good answer. *Reynolds v. Iremey* (d), *Stoughton v. The Earl of Kilmorey* (e), *Lacey v. Forrester* (f), *Mills v. Oddey* (g), and *Com. Dig.* (h), were also cited.

Hoggins in reply.—The duress and the want of consideration alleged in the bill were distinct matters, and had no connexion whatever, and both being contained in one plea, it was rendered double. He cited *Com. Dig.* (i).

TINDAL, C. J.—It appears to me, that the plea is bad. It is demurred to, on the ground that it contains two separate defences; but the answer to this is, that it is not bad for duplicity, because the second ground is badly pleaded. But does it follow as a conclusion of law, that, because one of two defences in one plea is badly pleaded, the plea is not therefore double? There are authorities to rebut such an assumption; it is laid down by *Doddridge, J.*, (k), that a plea containing several defences

(a) 2 Inst. 482.

(b) Ante, Vol. 3, p. 472.

(c) Ante, Vol. 4, p. 228.

(d) Ante, Vol. 3, p. 453.

(e) Ante, Vol. 3, p. 705.

(f) Ante, Vol. 3, p. 668.

(g) Ante, Vol. 3, p. 722.

(h) Tit. Pleader, 2 W. 19.

(i) Tit. Pleader, E. 2.

(k) Poph. 186; Com. Dig. tit. Pleader, E. 2.

is still bad, although only one of the matters contained in it is material.

Judgment for the plaintiff.

The Court, however, on the application of *Mansel*, gave leave to amend on payment of costs.

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FISHER v. HEWITT.

WIGHTMAN moved for a rule to shew cause, why an order made by *Vaughan, J.*, at chambers should not be rescinded. It was an action brought by the plaintiff against the defendant for an infringement of a patent, granted to him for certain improvements in a machine employed in making lace, and the defendant pleaded several pleas, and gave notice of various objections, on which he intended to rely at the trial, in pursuance of the statute 5 & 6 Will. 4, c. 83, s. 5; but a summons was taken out at chambers, calling on him to shew cause why he should not within two days furnish "intelligible and true" particulars of the objections he intended to offer at the trial of the cause. The summons was heard before *Vaughan, J.*, and that learned Judge made an order that, "the defendant do deliver more specific objections within two days." It was to set aside this order that the present motion was made, and it was contended, that it was not the object of the legislature in the recent act, to bind down either the plaintiff or the defendant in any action to very great precision in the particulars which he delivered; but only to compel him to give reasonable notice of the objections, on which he meant to rely. It was for the Judge at nisi prius to inflict a penalty upon the party delivering the objections, for it was provided by the act, that no objection should be allowed to be made at the trial, unless those alluded to in the notice were proved.

In the particulars of objection delivered under the New Patent Act, the substantial objections must be stated in distinct and intelligible language, and the particulars must not be confined to giving merely general information.

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Wilde, Serjt., and *Hoggins* shewed cause.—The power of the Court to interfere was undoubted, and had been distinctly settled by the recent case of *Bulnois v. Mackenzie* (a), when the Court considered the question as compared with the decisions on the statute of set-off. Nothing turned here upon the general words of the act, requiring a party to deliver a notice of the objections he intended to offer, because if the Court referred to the cases on the statutes under which notices of action were required to be given, they would see the construction put on the general words used in them. The notice given, however, must not merely comply with the precise words of the statute, but must comply also with the obvious meaning and intention of the legislature. A mere formula therefore in this case, setting forth every objection which could be offered was not a sufficient compliance with the act, for, if that were permitted, the provisions of the statute, which were intended to have a wholesome and salutary effect, would lose their force. The particulars here contained objections to the number of twenty. These were, that the grantee of the patent had not invented any improvement; that the grantee was not the first inventor; that the improvements were not invented by him; that if any part of the invention was new, it was useless, and unnecessary, and should not have been included in the specification; that the supposed improvements had been in use long before the granting of the patent; that the means by which the improvements might be employed were so imperfectly described in the specification, that they could not be applied. It was said in the specification that it was an improvement of the machinery used for making bobbin net lace, whereas there were several machines for making that description of lace, and whereas no improvement was shewn; that the machinery was al-

(a) Ante, p. 215.

ready complete, and that it was not improved by the supposed invention of the plaintiff: that the improvements or some of them were not new, and had been in general use; that the invention was more extensive than that described in the specification; that there were many descriptions of the invention in the specification which were useless and tended to mislead; that the invention was not an improvement, and that if it was, it was not of sufficient importance to be the subject of a patent; and, after several others, the defendant lastly gave notice that he should take all such further objections as should be deemed admissible under the plea. Many of these notices gave no information at all. [*Tindal*, C. J.—Some of them are intelligible enough; but the objection to them is, that they go so wide and give such merely general information, that they, in fact, are like the old plea of the general issue.] The intention of the statute was, that the parties might be prepared to meet each other at the trial of the cause upon specific points, and it was but just that the party to whose invention objections were made, should know what questions were to be relied upon. If, however, the plaintiff here were compelled to go to trial with such a notice as had been given, he must go prepared to defend and support every wheel and crank of his machine, and instead of the object of the new statute being complied with, so the expense of the trial decrease, the contrary must necessarily be the case. The particulars, it was true, exceeded the plea which had been delivered; but they were so general in their terms as to be quite useless. The legislature, by the passing of this act, had contemplated the possibility of patented rights being avoided, and had, therefore, given the power to the Court to compel an amendment of the particulars in case of need, and it was the duty, therefore, of the Court to give the patentee such particulars, as would enable him to have a fair opportunity of answering every objection which was raised.

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Wightman, in support of the rule.—It was remarkable, that down to the time of the passing of this act, the defendant was never known to be compelled to state his grounds of defence and objections, and the patentee was therefore in great difficulty, for it was incumbent on him to make out his case; and it had often happened, that he had gone into Court with the general issue pleaded by the defendant, quite ignorant whether the defendant intended to object to his patent, or whether his object was to set up a defence upon the merits. The intention, then, with which this statute was framed, was, that the patentee might be informed whether his patent was attacked or not, and therefore the defendant was compelled to state his grounds of objection; but that minute description of every point of his defence, which was called for on the part of the plaintiff was never intended to be given. Suppose a defendant were to take, in a formal manner, every ground of objection possible to be framed, it would amount only to this, that the plaintiff must come to the Court prepared to shew that his patent was right in all points. The defendant was entitled to take any objections he thought available for his case, and he could not be restrained, and the penalty given in case of any being taken which were improper, and which were not proved, was, that the Judge at *Nisi Prius* might prevent him from going into them. The question then, must, in such a case, be considered at *Nisi Prius*, and not here; and the suggestion on the other side, that the cases of notice of action were analogous, bore out this impression, because, objections of that nature were always taken at *Nisi Prius*, and were the grounds of nonsuit. [*Park, J.*—There is the last notice, that the defendant means to take only such objections as are admissible under the plea. If your argument is right, the Judge at *Nisi Prius* would be placed in a position of very great difficulty.] That was a mere general objection; for the defendant might say that all the parts of the improve-

ments were useless, and that the existing machine was the best. It would be unjust to fix the defendant down to some only of the objections he intended to make, and it never could have been intended, that he should be driven to such particularity as was contended for. Suppose the defendant should say that he could not amend; to what extent would the Court go in striking out those objections, of which notice had been given? This was a question most difficult to answer; and the Court would not sanction this attempt on the part of the plaintiff to place the defendant under terms never contemplated by the legislature.

TINDAL, C. J.—I think this rule must be discharged. The question is, whether there is, in this particular of objections which has been delivered, matter so uncertain and indefinite as to be calculated rather to mislead the plaintiff than to put him in possession of the particulars required, and I think several of the objections are of that nature. I take the general object of the act to be as it has been stated by Mr. *Wightman*, not to limit the grounds of defence on which the defendant may think proper to stand, but to diminish the expenses of trials of this sort, and more particularly to prevent the plaintiff from failing, as he often has, at *Nisi Prius*, by some turn of evidence which he never expected would be brought forward against him, and therefore the act, when it requires a notice to be given, means such a notice as shall really give information to the plaintiff's mind. I am not at all afraid of the prolixity to which Mr. *Wightman* alluded ever occurring, if it is necessary to point out the objections with great particularity; because I am certain that if a defendant makes objections to the extent suggested, the effect produced on the minds of the jury will prevent any repetition of such an occurrence, for, the party would find that he would have been in a better

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situation if he had put his defence on such grounds only as were necessary. Now, with regard to the objections here, some of them are calculated to mislead the plaintiff, and the first is, that certain parts of the alleged inventions are not properly described, and are not improvements, and in another notice, it is said that the improvements were in use before the granting of the patent. Then let him, in reference to them, point out to what particular parts he refers, and let him give notice of the particular items to which his notice alludes.

PARK, J.—I am of the same opinion; and I do not think that it is the duty of the Court to point out how the party is to amend any notice of objections which has been delivered, but we need only say that they must be amended. Cases of this description are not new in the Courts, although applications under the Patent Act have not frequently occurred, and we never say how particulars are to be amended, but we only state that they are imperfect, if they are so, and that they must be altered, and if not amended properly, that they must go back again. Now, by the 5th section of this act, the party is required to be furnished by the objector with the objections on which he intends to insist, and it is most wise that it should be so when men give in so many objections, and clothed in the terms and figures used here. In my judgment, there never was so clear a case.

VAUGHAN, J.—I am of the same opinion. When the case was before me, Mr. *Wightman* was inclined to raise a question, whether a Judge at chambers had a right to interpose to grant an order for new objections, and it was contended that he had no right to interfere with the first particulars, but only with those which were given by way of amendment; but it is not now intended that that question shall be discussed, the jurisdiction of the Judge being

admitted. As to the act of Parliament, it might be said that the parties here had given a notice under that part of the act by which it was required. But if any further notice is called for, then comes the question, is that information given which is proper, or does this notice impart any knowledge at all to the party who has a right to know what the objections are? I think it does not; and that the object has been to mystify the real question and keep it out of sight if possible, so that the plaintiff cannot know what he has to answer. If this were permitted to be successful, the act would be of no benefit at all.

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COLTMAN, J.—It is incumbent on the Court, before sending this case down to trial, to see that the objections to the patent are stated in a distinct and intelligible form, in order that the defendant may not, under one description, introduce another objection to surprise the plaintiff. It is much better that this should be determined before trial than after it, or that, in consequence of any informality, either party should have an opportunity of moving for a new trial. Although it is true that a party is not to be precluded from advancing any objection to the patent, and that he has a right to go into every one which may strike him as being reasonable and fair, yet he must state them in distinct and intelligible language; and although that may lead to great prolixity of statement, yet no person who is well advised will think of going before a jury with such a mill-stone round his neck, as the number of objections, which it has been suggested might be offered, would prove.

Rule discharged.

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WETTENHALL v. GRAHAM.

To an action of trespass, a plea alleging the insolvency of the plaintiff, since the trespass, but before action brought, and that his estate is vested in the provisional assignee:—*Held*, not an issuable plea within the meaning of a Judge's order to plead issuably.

ADDISON had obtained a rule nisi, for setting aside the interlocutory judgment, signed in this action, for irregularity, against which,

W. H. Watson shewed cause.—It was an action of trespass; and the declaration charged the defendant with having broken and entered a certain messuage or warehouse belonging to the plaintiff, and with having seized, and taken, and carried away the chattels of the plaintiff, and with having so disturbed him in his peaceable possession of the premises. The defendant was under terms to plead issuably, and to take short notice of trial, but he afterwards pleaded six pleas, and the plaintiff signed judgment. The question was then, whether any one of the pleas was not issuable, for if that was the case, the judgment was regularly signed. *Waterfall v. Glode* (a). The fifth plea set out, that the plaintiff being a prisoner in Whitecross Street prison, for and by reason of certain debts, did duly and according to the provisions of a certain act, &c., petition the Court for the discharge of insolvent debtors, to be discharged from his liabilities, and that he did then duly execute a conveyance and assignment of all his right, title, and interest in his real and personal estate and effects, in trust, to the provisional assignee, and that it was before the said conveyance and assignment that he had been damaged by reason of the said trespasses in the declaration alleged. And, that, after the committing of the said trespasses, the value of the said trust and estate, so conveyed and assigned, had been diminished and damaged to the full amount of the damage sustained by the plaintiff, by reason of the said

(a) 3 T. R. 305.

trespasses. To this plea, the plaintiff objected on the ground that it was not issuable, and it was besides contended, that no such assignment as that alleged would vest damages, in respect of any trespass, in the provisional assignee. In *Clark v. Calvert* (a), it was decided that trespass quare clausum fregit might be maintained against a stranger, by the tenant of the land for a trespass committed before his bankruptcy.

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Addison, in support of the rule, submitted, that the question for decision was, not simply whether the plea was issuable or not, but whether the right of action, in respect of this trespass on the plaintiff's messuage, was not conveyed by the assignment to the provisional assignee. It was a plea which went only to the damage of the personal effects of the plaintiff, and if the action had been for damage done to the goods of the plaintiff, the right to sue would have passed to the assignee. The personal estate would pass; so, therefore, the damage done to the personal estate must be the subject of an action by the assignees. This, however, was not the only question. The declaration had been delivered on the 30th of April, and on the 4th of May, the defendant obtained a week's time to plead; and subsequently, upon a summons being taken out for leave to plead several matters, an order was made, giving him leave to plead the pleas now on the record. It was the duty of the plaintiff therefore to object to the pleas before the learned Judge at chambers, and if the matter was contested there, the plaintiff would not be permitted to treat the plea as a nullity, and sign judgment. It was sworn besides, that the pleas were delivered on the 10th of May, and that no objection was then made to them; but they were retained until the 25th of that month,

(a) 8 Taun. 742.

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when they were sent back, and judgment was signed. The pleas therefore were treated as a nullity, after they had been approved of by a Judge. In *Horsley v. Pardon* (a), it was held, that a plea being delivered after nine o'clock in the evening could not be treated as a nullity, and a judgment signed on that ground, no notice having been given of the objection to the defendant, was set aside. It was unnecessary in the plea to allege the discharge of the plaintiff, but it was sufficient to state the assignment, and that was good, unless the petition was dismissed. *Smith v. Coffin* (b), and *Staples v. Holdsworth* (c) were both in point; and although in the latter case it was held, that a plea alleging the bankruptcy of one of several plaintiffs, was not an issuable plea, yet where there was only one plaintiff in the cause, the case was different.

W. H. Watson, on the point of the allowance of the pleas before the Judge at chambers, contended that that was immaterial, and that the merits of the pleas were not decided there.

Cur. adv. vult.

TINDAL, C. J., on a subsequent day, said, that the Court considered that a plea alleging the insolvency of the plaintiff, was not an issuable plea within the meaning of the Judge's order, and that the rule must be discharged.

Rule discharged.

(a) Ante, Vol. 2, p. 228.

(b) 2 H. Bl. 444.

(c) Ante, p. 196.

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M'GRATH v. HARDY.

ASSUMPSIT for money had and received. There were several pleas on the record, but the only important one now for consideration, was the fourth. By that plea, the defendant alleged a custom in the Lord Mayor's Court, in the city of London, by means of which a judgment of foreign attachment had been obtained, under which, he had paid the money now sought to be recovered into the hands of one J. G. T., to whom the plaintiff was indebted. It appeared, that the practice of the Lord Mayor's Court was, that the party indebted was first summoned to appear, and, in the event of his not appearing, a return of nihil was made, and he might then be attached by money or goods of his in the hands of any person within the jurisdiction of the court. He was then called in four successive courts, of which calls a record was kept, when, if he did not answer, the garnishee or holder of the property was warned to appear, to shew cause why the plaintiff or garnishor should not have execution against him for the amount attached. If the garnishee then failed to appear, or did appear and plead, but judgment was given against him, the Court awarded execution to issue, security being given that, if the original defendant should appear within a year and a day, and disprove the debt, the money should be returned to him.

It was alleged, in the present case, that in accordance with this practice, one J. G. T., on the 31st January, 1828, made plaint in the Lord Mayor's Court, that the plaintiff (M'Grath) was indebted to him in the sum of 1,000*l.* within the jurisdiction of the court, and that a summons having been issued, a return of nihil was made; that it was then averred in the said Court, that the defendant was indebted to the said M'Grath in the sum of 500*l.*, and process of attachment was therefore prayed; that process having

Where an issue was raised on the fact of an execution in the Lord Mayor's Court, in the city of London, it was held that the jury were not precluded, by the production of the record of that court, from finding the real facts of the case.

Without execution executed, the garnishee is not discharged.

The mere fact of an attorney being the partner of the attorney who acted for the garnishee in the Mayor's Court, does not render him incompetent to prove the custom of that court.

To a plea of a foreign attachment in the Mayor's Court, it is not a good replication that no notice was given to the defendant in that court.

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been granted, on the 2nd February a return of the attachment was made, and that, subsequently, the said M'Grath was called in four separate courts, but that he made default, of which a record was kept; that process was then prayed and granted, to warn the defendant, as garnishee, to appear on the 7th February, and that afterwards, on the 7th July, he did appear to oppose the demand of the said garnishor, but that, proceedings being had, on the 20th July, 1830, the Court awarded judgment and execution to the said garnishor, security being given, in pursuance of the practice; that, subsequently, notice was given to M'Grath of the said proceedings, and that execution having issued, and having been executed, the garnishor acknowledged satisfaction.

To this plea, the plaintiff replied, alleging that he had not received notice of the said proceedings; that the said J. G. T. had not execution of the monies of the plaintiff in the hands of the defendant, and alleging that the defendant paid the monies so as aforesaid alleged to have been recovered, not by compulsion of law, but by collusion and contrivance with the said J. G. T. On this, issue was taken, and the cause went down to trial. It was then shewn that the entries in the Lord Mayor's Court corresponded with the plea; but, from the testimony of Mr. Ashley, an attorney of that court, it appeared that, for the last twenty-five years, the proceedings alleged to have been necessary had never been absolutely taken, but that they were treated merely as a ceremony; that there was usually no summons issued to the original defendant, nor was there any return of nihil, but that all was done merely by an entry in a book kept in the Court. An objection was made to the reception of the evidence of this witness, on the ground that he was a partner of Mr. Wardell, the attorney who acted for Hardy, the garnishee, in the cause; but the learned Judge refused to admit this as a ground of rejection. It was besides shewn, that the plaintiff had

resided abroad between the years 1824 and 1834, and that in the year 1827, he made a consignment to the defendant of the amount alleged to have been received from him as garnishee. That, in a correspondence which took place between the parties, the defendant mentioned that an attachment had been issued by J. G. T., who it appeared was a relation to the defendant, but there was no evidence to shew, that he was ever made aware of any ulterior proceedings until his return to England in 1834. The jury returned a verdict on these facts for the plaintiff, subject to the opinion of the Court on a special case setting out the facts and pleadings.

Wilde, Serjt., in Easter Term, appeared on behalf of the plaintiff. The question for consideration in reality was, whether it was not in the power of the plaintiff to prove all the proceedings alleged in the Lord Mayor's Court to be fictitious, or whether the judgment and execution obtained in that Court, and the entry of satisfaction on the record, must be taken to be conclusive. There being, in fact, however, no summons, and no return of nihil, there was nothing to warrant the supposed subsequent proceedings, and although *prima facie*, the record might be taken as evidence of what had taken place, yet the plaintiff might contradict it, if he was able. *Palmer v. Hooke* (a); *M'Daniel v. Hughes* (b). Many cases were besides collected upon the subject in 1 *Saunders* (c). The objection to the evidence of Mr. Ashley could never be sustained, for the facts to be proved were no matter of confidential communication between him and his partner's client, and his testimony was besides corroborated by that of the serjeant at mace of the Court. The answer set up to the judgment which was alleged, shewed the absence of every particular necessary to make it a

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(a) 1 Lord Raym. 727. (b) 3 East, 367. (c) P. 66, n. (a).

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legal and complete one; and unless the suggestion, that the roll of the Lord Mayor's Court was final, should be adopted, there could exist no further difficulty in the case, and the plaintiff must have judgment. In the case of *Wetter v. Rucker* (a), this court expressed an opinion, that the jurisdiction of inferior courts must be watched closely, in order that it might be seen that they were not improperly acted upon, but if the power, which, in the present case, it was contended, ought to exist, were allowed to continue, the most mischievous results were to be apprehended. If the defendant had intended to rely on the estoppel, by which the plaintiff would have been precluded from questioning the proceedings, he should have demurred to the replication, which tendered issue on them, and on the facts, but he pleaded over, and could not now question the finding of the jury. But, if the defendant's argument were here allowed to prevail, what remedy would there be for a person whose property was improperly taken, by means of such a judgment? It would be unjust that he should be bound by the production of such a record. *Huxham v. Smith* (b). The plaintiff's right could not depend upon the disposition of the garnishee to traverse the debt alleged by the garnishor, because he might set that up as a defence to an action against himself. No means were, in reality, taken to convey intelligence of the proceedings to the plaintiff, but judgment was allowed to be obtained and execution had, as it was alleged, by connivance and fraud. The whole proceedings were merely the act of the parties, and the Court did not interfere in them; they were commenced by an affidavit, sworn by the garnishor, and this, unless it was questioned before a certain time had elapsed, was final. The Court, therefore, would not allow the plaintiff's rights to be concluded. *Paramore v. Paine* (c); *Coke v. Brain-*

(a) 1 B. & B. 491.

(b) 2 Camp. 19.

(c) Cro. Eliz. 598.

forth (a); *Vooght v. Winch* (b), and *Stark. Evid.* (c) were also cited.

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Bompas, Serjt., for the defendant.—The replication was, that the plaintiff never had notice of the proceedings, and that J. G. T. had not execution; but it was not denied that the money was paid. The replication was, therefore, in fact, an allegation, that what had taken place did not amount to an execution. That, however, was matter of law, and the record must be taken to be conclusive of the facts stated in it. He cited *M'Alley's case* (d), *Reed v. Jackson* (e), the judgment of Lord *Ellenborough* in *Ramsbottom v. Buckhurst* (f), *Rex v. Hopper* (g), *Dudlow v. Watchorn* (h), *Hooper v. Hooper* (i), and *Fisher v. Lane* (k). So, also, in cases of convictions by magistrates, and probates of wills, the record was always conclusive. There was no connivance, and the payment was not voluntary, but by compulsion of law. *Carter v. Carter* (l), *Shaw v. Woodcock* (m), and *Hills v. Street* (n), were all in point. If a party were liable to be coerced, it was sufficient to make compulsory a payment under fear of that coercion, and there was no objection to a person in the situation of the defendant allowing J. G. T. a preference, and even advising him to proceed by attachment. Then, as to the admissibility of the attorney's evidence; it was by reason of his capacity of partner to the attorney in the cause, that he ascertained that the proceedings were all fictitious, and he ought not therefore to have been examined.

Wilde, Serjt., replied, and cited *Self v. Kennicot* (o). No weight could be attached to the record. That docu-

(a) Cro Eliz. 830.

(b) 2 B. & Ald. 662.

(c) Vol. 2, pp. 226, 227.

(d) 5 Coke's Rep. 70, a.

(e) 1 East, 355.

(f) 2 M. & Sel. 565.

(g) 3 Price, 495.

(h) 16 East, 39.

(i) 1 M'Cl. & Y. 509.

(k) 3 Wilson, 297.

(l) 5 Bing. 406.

(m) 7 B. & C. 73.

(n) 5 Bing. 37.

(o) 2 Shower, 506.

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ment usually derived its importance from the fact of its being entirely kept by some responsible officer, but here it had been shewn that the final entry of satisfaction was in the handwriting of the garnishor himself.

Cur. adv. vult.

TINDAL, C. J., in Trinity Term, delivered the judgment of the Court. After stating the pleadings, he said:— Upon the facts proved in this case three questions arise: first, whether the material allegations of the replication are proved in point of fact: secondly, whether, by any technical rule of law, the plaintiff was precluded from proving, and the jury from finding, the truth of the case; and, thirdly, whether the facts stated in the replication contain a sufficient answer to the plea.

It will be most convenient to consider first in order, the last of these three questions. The first allegation of the replication is, that the plaintiff had no notice of the proceedings in the foreign attachment. This allegation does not furnish any ground of answer to the plea, for the custom of the city, as set out in the plea, is admitted in the replication, and has been confirmed in Parliament, and the custom does not require that any notice should be given to the defendant in the attachment, of the proceedings in the Mayor's Court. That allegation, therefore, appears to us to be immaterial and idle.

The next allegation is, that there was no execution executed. This is repeated with some slight variation in terms; but the whole amounts to an allegation that there was no execution executed pursuant to the custom. It scarcely requires an authority to shew that this allegation contains, in substance, a good answer to the plea: for the plea being only good by the custom, it follows that unless the custom is pursued, the defendant must fail in his defence. Now, the custom is alleged in the plea to be, that

after execution had and executed, the garnishee shall be discharged as against the plaintiff below. The allegation in the replication shews, therefore, that the custom has not been complied with. If an authority was required on this point, the case of *Wetter v. Rucker*, and the cases cited there, are in point to shew that, under such circumstances, the defendant is not discharged. The replication contains, further, a statement that the money paid was paid without compulsion and by connivance and collusion. It is not very clear what precise legal ground of defence is here meant to be relied on, nor is it essential to inquire, as, for the reasons already assigned, the replication contains a sufficient answer to the plea.

The next question for consideration is, whether the material allegations of the replication were proved in fact. The only allegation, which it was essential for the plaintiff to prove, was that there was an execution executed according to the custom. For, by the ordinary rule of pleading, a party is only bound to prove the substance of the matter pleaded, that is to say, so much of a plea or replication as constitutes a complete and valid answer to the matter alleged in the adverse pleading, which it professes to answer. Now, it is expressly found in the case, that no writs or precepts of execution were issued or executed in the cause, or served upon the defendant in that cause, or on the garnishee, the now defendant. The replication must, therefore, be considered as proved in point of fact. And this seems to be a convenient place for noticing an objection, which is made on the defendant's behalf, to the examination by the plaintiff of Mr. Ashley. Mr. Ashley was, at the time of his examination, the partner of Mr. Wardell, who had been the attorney for Mr. Hardy in the foreign attachment. The counsel for the defendant objected, on that ground, to his disclosing any facts connected with the cause. But we think this objection is far too wide. The party objected to was not the

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attorney in the cause ; and if he had been, an attorney may know many facts connected with the cause which he has not learnt from his client, or in the course of the cause ; and there is nothing to shew that he was examined, in the present instance, to any facts which came to his knowledge under the seal of professional confidence.

It remains only to consider the second question, which is, whether the plaintiff was precluded from proving, and the jury from finding, the truth of the case by a technical rule of law.

It was strongly insisted in argument, on the plaintiff's behalf, that the record in the foreign attachment was conclusive ; and that not only the plaintiff but the jury also were concluded by it, and the cases of *Reed v. Jackson*, *The King v. Hopper*, and *Huxham v. Smith*, were relied upon : the cases were referred to in which convictions before magistrates have been said to be conclusive of the facts stated in them ; it was asked whether a probate could be controverted in evidence ; it was insisted that in no case could the facts stated in a record be disputed : and the judgment of Lord *Ellenborough* in *Ramsbottom v. Buckhurst*, was cited in support of the proposition contended for in its fullest extent.

It is undoubtedly true, as a general rule, that no man can make any averment contradictory to a record. Our law books are full of cases in which this doctrine is stated, or distinctly implied :—see *Plowden*, 491, *Johnson v. Smith* (a), *Baily v. Bunning* (b), *Rex v. Mann* (c), *Hynde's case* (d), and the cases cited already. But, although it is true that no one can be allowed to aver against a record, and that not only parties and privies, but even strangers also, are estopped to aver any thing to the contrary, it is a different question, whether this estoppel will bind the

(a) 2 Burr. 950.

(b) Sid. 271.

(c) 2 Str. 749.

(d) 4 Rep. 72;; 2 Leon. 121 ;
 Olden. 138.

jury from finding the truth of the fact, where the estoppel is not pleaded or relied on. A jury may indeed, it is said, find matter of estoppel, though it is not pleaded and relied on, and when it is found, the Court shall judge according to law, (Com. Dig. Pleader, s. 4); and, therefore, if a man makes a lease by indenture to A. of his own land, whereby A. is estopped to say it was not demised, the jury may find such matter though it is not pleaded; (Com. Dig. *quà suprà*.) And in *Pleadul's case*, cited in *Rawlins's case*, (4 Rep. 53, and Cro. Eliz. 36), which was an ejectment, to which, the general issue had been pleaded, because the jury did not find a deed indented, which took its operation only by conclusion, they were attainted and judgment accordingly; the reason of which case may, perhaps, be collected from what is said in *Treviban v. Lawrence* (a), that where an estoppel is of such a nature that it creates an interest and works upon the estate of the land, the jury are estopped.

But, however, the case may be in the special case of an estate in the land by estoppel; and where the question arises upon the general issue, there are not wanting cases to shew, that in general an estoppel does not bind the jury, and more particularly, that if the estoppel appears upon the record, and the party, who is entitled to take advantage of it, instead of relying upon it, goes to issue on the fact, he puts the matter at large, and the jury may disregard the estoppel. Thus, in *Goddard's case* (b), which was debt on bond, the reason of the judgment was said to be, that although the obligee was estopped to make an averment against any thing expressed in the deed, yet the jurors, who are sworn to say the truth, shall not be estopped, for an estoppel is to conclude one to say the truth; and therefore jurors cannot be estopped, because they are sworn to say the truth. So, in the case of

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(a) 2 Lord Raym. 1051.

(b) 2 Rep. 4.

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Speake v. Richards (a), which was an action of debt for 523*l.* 17*s.* against Richards, sheriff of Southampton, on his return to a *levari facias*, that he had levied the monies which he had ready; the defendant quoad 308*l.* pleaded *nil debet*, whereupon the plaintiff took issue; and as to the rest, pleaded payment and acquittance, whereupon the plaintiff demurred. One point urged for the plaintiff was, that the plea of *nil debet* was naught, being directly contrary to return of record; but it was answered, that since they had not relied on the estoppel, but had taken issue, that could give no advantage.

The law on this point is laid down with great distinctness in *Treviban v. Lawrence*:—"The Court," it is said, "took this difference, that where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel, for here is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel, where he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for then, they are to find the truth of the fact which is against him. Thus, in debt for rent on an indenture of lease, if the defendant pleads *nil debet*, he cannot give in evidence that the plaintiff had nothing in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture, and estopped him; but if the defendant pleaded *nihil habuit*, &c., and the plaintiff will not rely on the estoppel, but reply *habuit* &c., he waives the estoppel and leaves it at large, and the jury shall find the truth notwithstanding the indenture."

These cases, we think, furnish a sufficient ground for holding, in the present case, that the defendant by taking

(a) Hob. 206.

issue on the replication has waived any benefit he might have derived from the estoppel, and has left the matter at large to be decided according to the truth and justice of the case.

Our decision standing on the grounds above explained, does not clash with the cases cited on behalf of the defendant, being distinguishable therefrom on the ground that the defendant has, by his own act, expressly waived the benefit of the estoppel, and referred the truth of the fact to the consideration of the jury.

Upon the whole, therefore, we think that the issue raised on the fourth plea must be considered as having been found for the plaintiff, and consequently that he will be entitled to judgment in his favour.

Judgment for the plaintiff.

CURLING v. SEDGER.

THIS was an action brought by an attorney, to recover the amount of his bill for costs incurred in prosecuting a person charged with felony at the Central Criminal Court, and application having been made to Lord *Abinger*, C. B. he had referred the bill to the Master for taxation.

Stephen, Serjt, in Easter Term, moved for a rule, calling upon the defendant to shew cause why this order should not be discharged, and contended that the items contained in the bill were not of a taxable nature. They were all charges for business done at the Central Criminal Court and at a police office, and no provisions were contained in the statute 2 Geo. 2. c. 22, on which taxations were founded, which would bring these charges within the power or cognisance of any officer of the superior courts.

Where an action has been brought for a bill of costs for business done in prosecuting a felon at the Central Criminal Court, a Judge at chambers has the power to make an order to refer the bill to the Master for taxation.

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The mere fact of the plaintiff being an officer of this Court did not render his bill liable to be taxed, because that would impose a hardship on him, which others did not suffer, as persons, who were not attorneys, were in the habit of practising at the Central Court. He cited *Sylvester v. Webster* (a), and *Becke v. Wells* (b).

Wilde Serjt. and *Smythies* in the same term shewed cause. The law of taxation was founded on the Statute 2 Geo. 2. c. 22, but that was a remedial statute, and must be liberally construed, and it was expedient to extend its operation rather than to confine it. *Smith v. Taylor* (c). This rule had been frequently acted upon with advantage, and it was not sought, therefore, to introduce any new proposition. *Ex parte Williams* (d), *Clarke v. Donovan* (e), *Wardle v. Nicholson* (f), and the case of *Sylvester v. Webster*, already cited, were also in point. In *Wardle v. Nicholson*, *Patteson, J.*, referred to the statute 12 Geo. 2. c. 13. s. 7, shewing that bills for business done at county courts were taxable. The Central Criminal Court was established by the statute 4 & 5 Will. 4. c. 36, and by sections 4, 6, and 12, authority was given to the Judges to award costs to prosecutors and witnesses. The Judges of the superior courts were made members of that court, and it was besides provided, that indictments found at the Quarter Sessions might be removed there, and thence to the court of Queen's Bench, and writs of error would lie from that court. It was also a court of oyer and terminer, and a court of record. The court, in considering the question now before them, would look to the inconvenience to which a decision that the bill could not be taxed would give rise ; as the effect of it would be, that on the

(a) 9 Bing. 388.

(b) 1 C. & M. 75.

(c) Ante, Vol. 1, p. 212.

(d) 4 T. R. 124, 496.

(e) 5 T. R. 694.

(f) 4 B. & Ad. 469.

trial, the attorney] would have to shew that every item in his bill was a reasonable one. Now, an objection would be raised, that in the Central Criminal Court there was no taxing officer, and the case of *Becke v. Wells*, which had already been cited, would be relied upon. That was a case of an application to tax a bill of costs for business done at a court of Requests, and the objection was, that there was no taxing officer attached to that court. But, the Judges of the Central Criminal Court had the power of awarding costs, and if that power existed, an incidental power to tax those costs must be presumed, which might be delegated by the Judge to the officer of the court, the clerk of the crown. But it was said, that any person, not an attorney, was at liberty to practise at the Central Criminal Court. This, however, would not alter the case of the bill of costs of an attorney, nor would it remove its liability to be taxed, for in *Smith v. Wattleworth (a)*, Lord Tenterden said, "Many things may be done in some courts, as, for instance, the court of Quarter Sessions, by persons who are not attorneys; and no court could tax the bills of such persons. But, when the same business has been done by attorneys of this court, it has been held otherwise." It could not be contended, that the business was not done at law, for the court, in which it was done, was subordinate only to the court of Queen's Bench, and besides it received records from the court of Quarter Sessions, and was presided over by the Judges of the superior courts, who administered the law there, and their judgments might be reviewed by writs of error. The costs, here, in fact, were not costs between attorney and client, but between the prosecutor and the county, by which, they were eventually paid; and that the officer of the court was, to all intents and purposes, a taxing officer, was evident, because the

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(a) 4 B. & C. 364.

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costs to be allowed under the statute were not definitely pointed out, but their amount was to be ascertained.

Stephen, Serjt., and *Channell*, in support of the rule.— It did not appear that any custom or practice had been established, and therefore it was important that the question should be settled. It could not be said, that it was the practice to refer such bills to the officer of any one of the superior Courts, and as no general jurisdiction existed in the Courts of Westminster, to refer bills of costs for taxation, the order of the Lord Chief Baron must be discharged. The case of *Dagley v. Kentish* (a) was in point.

The case must rest, then, entirely on the words of the act of Parliament, and unless by its provisions, the bill was required to be referred, it could not be taxed, because every man had a common law right, to have his services estimated by a jury. It must be admitted, that the statute was remedial, but injustice must not be worked for the sake of convenience. By the construction to be put upon the act, where a bill was to be taxed, it must be for business done in the court, to the officer of which, it was to be referred: *Ashton v. Molyneux* (b). That case gave the natural and proper construction to be put upon the statute, and it was only in the later cases that there had been any deviation from the original practice: *Stephenson v. Taylor* (c), *Ex parte Williams*, *Clarke v. Donovan*, already cited. In the latter case, however, the decision was not that the bill was taxable, but only that it must be delivered a month before action brought. In the Central Criminal Court there was, in fact, no taxing officer within the meaning of the act; for although a person regulated the allowances to witnesses, there was no taxation between party and party, or between attorney and client, and the allow-

(a) Ante, Vol. 1, p. 330.

(b) Barnes, 122.

(c) 4 T. R. 124, n.

ance was made on a particular scale laid down. *Ex parte King* (a), *Ex parte Partridge* (b), *Williams v. Odell* (c), *Rex v. Bach* (d), and *Howard v. Groom* (e), were all in point.

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Cur. adv. vult.

TINDAL, C. J., in this term delivered the judgment of the Court.—The short question in this case is, whether, pending an action brought by an attorney of this Court for the recovery of his bill of charges for business done in the Central Criminal Court, a Judge may make an order for the taxation of such bill upon the usual terms, and we are of opinion that such an order may be made.

That the action is brought for the recovery of fees, charges, and disbursements at law, within the meaning of the statute, appears to us to follow, from the consideration of the constitution of the court in which the business was done. The Central Criminal Court is a common law court of oyer and terminer and general gaol delivery, a court which has been held for centuries for the city of *London*, and for the county of *Middlesex*, and which has been only so far altered and modified by the provisions contained in the late statute, (4 & 5 W. 4, c. 36), as is necessary for the purpose of comprehending certain defined parts of the adjacent counties, within the jurisdiction of the Court.

The bill, therefore, falls within the first part of the 23rd section of the 2 Geo. 2, c. 23, as a bill that must be delivered a month before action brought; upon the same principle that a bill for business done at quarter sessions has been held to fall within the provision of the statute; and, undoubtedly, the general understanding and practice in the profession has always been, that where the attor-

(a) 3 N. & M. 437.

(c) 4 Price, 279.

(b) 3 Swans. 398.

(d) 9 Pr. 349.

(e) Ante, Vol. 4, p. 21.

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ney's bill is necessarily to be delivered under the statute, before action brought, the same falls also within the second branch of the statute, and may be referred to be taxed. One objection has been relied upon against the application of the statute in this case, namely, that there is no taxing officer of the Central Criminal Court, whereas, at the quarter sessions it is alleged that there is a taxing officer—the clerk of the peace. But, we think, the clerk of the crown in the Central Criminal Court must be considered for this purpose as standing precisely in the same place as the clerk of the peace at the quarter sessions. The clerk of the peace is not in strictness a taxing officer, as between the attorney and client, although his duty calls upon him to regulate the charges in the attorney's bill as between the prosecutor and the county: and, as he has been considered a taxing officer, there seems no real distinction between him and the clerk of the crown.

But we rest our opinion principally upon the latter part of the 23rd section, by which, the judges of the respective courts are required to “refer the said bill, and the attorney's demand thereupon to be taxed, although no action or suit shall be then depending in such court touching the same,” for we think those words do, by necessary implication, recognise the authority of the Court, as existing before and at the time the statute was passed, to refer the attorney's bill to be taxed where it is for charges at law, and where the attorney has brought his action to recover the amount, and such action is still depending in the court to which application is made. We therefore think the present rule must be discharged.

Rule discharged.

QUEEN'S BENCH PRACTICE COURT.

Trinity Term,

IN THE FIRST YEAR OF THE REIGN OF VICTORIA.

DOE *d.* COLSON *v.* ROE.

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MOODY moved for judgment against the casual ejector. It was sworn in the affidavit on which he moved, that the tenant was keeping out of the way to avoid service. The deponent went to the house sought to be recovered, and having been informed, that the tenant was at home, he put a ladder against the drawing-room window and got up to it. While there, believing that the tenant was in the room, he explained at the window the nature of the proceeding, and a copy was stuck up on the door. It was submitted, that these facts entitled the lessor of the plaintiff to a rule nisi.

Special service
in ejectment.

COLERIDGE, J.—You may take a rule nisi, which may be served at the dwelling-house, personally if possible; but if not, then in the same way as the copy of the declaration was served.

Rule nisi accordingly.

DOE *d.* TIMMINS *v.* ROE.

BAYLEY moved for judgment against the casual ejector. The affidavit of service stated that the copy of declaration

Service of a
declaration in
ejectment on
the son of the

tenant on the premises, is sufficient for a rule nisi for judgment against the casual ejector, where it seems reasonable to suppose that the declaration has come to the tenant's hands.

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had been served on the son of the tenant on the premises, and that the son afterwards stated that his father came home that night, and received the declaration.

COLERIDGE, J.—You may take a rule nisi.

Rule nisi granted.

WILLIS v. OAKLEY.

Judgment as in case of a nonsuit absolute in the first instance, after a peremptory undertaking to proceed to trial in the sheriff's court, unfulfilled, may be obtained.

MARTIN moved for judgment as in case of a nonsuit absolute in the first instance, after a peremptory undertaking. The only peculiarity in the case was, that the peremptory undertaking had been given to try at the Sheriff's Court, pursuant to which, the plaintiff did not proceed. By analogy to the cases, which had decided that judgment as in case of a nonsuit for not proceeding to trial, might be obtained in the Sheriff's Court, the defendant was entitled to this rule.

COLERIDGE, J.—I think you may have your rule.

Rule granted.

VENNER v. OXENHAM.

A defendant is entitled to his discharge under the 48 Geo. 3, c. 123, although he may have been brought up under the Lords' Act, and claimed his sixty days, which period is unexpired.

DOWLING applied pursuant to the ten days' notice required by 1 Reg. Gen. H. T., 2 Will. 4, s. 90 (a), for the discharge of the defendant out of custody, he having remained in execution for twelve successive calendar months, in respect of a sum not exceeding 20*l*.

Butt appeared to shew cause in the first instance. He objected that the defendant had been brought up at the

(a) Ante, Vol. 1, p. 195.

instance of the plaintiff under the Lords' Act, and had claimed sixty days, and that period had not expired, and therefore the defendant could not be entitled to his discharge. In the case of *Ex parte White* (a), it was held that a defendant was entitled to his discharge, under this act, although he had been brought up under the Lords' Act, and the sixty days claimed had expired. Here, however, as they had not expired, that case could not be considered as an authority in favour of the present application.

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Dowling, contra, submitted that the fact of the sixty days having expired or not, could make no difference in the defendant's rights. The case of *Ex parte White* was a much stronger one than the present. There, the sixty days having expired, and the schedule required by the statute not having been delivered, the defendant was liable to be transported for seven years. The Court however, were of opinion, that the defendant was entitled to his discharge. Whatever the defendant's delinquency might be with respect to other statutes, she was clearly entitled by the express language of the 48 Geo. 3, c. 123, to her discharge, in respect of the debt of 20*l.*, for which, she had remained in execution twelve successive calendar months.

COLERIDGE, J.—I see no distinction between the present case and that of *Ex parte White*. The defendant is therefore entitled to her discharge.

Rule absolute.

(a) Ante, Vol. 1, p. 66.

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EYRE, Gent., one &c. v. EDWARD THORPE.

(Before the Four Judges.)

"Costs of issues" include costs of the trial of them.

Costs of opposing an unsuccessful application for a new trial, are costs in the cause.

If an application to take money out of court is granted, and the rule is silent as to costs, the successful party is entitled to the costs of the application.

MR. EYRE applied in person for a review of the Master's taxation, under the following circumstances.

In 1831, that gentleman recovered a judgment against the defendant Edward Thorpe for his bill of costs, and sued out a fieri facias thereon indorsed to levy 310*l.*, by virtue of which, the sheriff of Bucks seized certain crops of corn and hay and other effects to the amount claimed. After the judgment, and before the seizure, the defendant Edward Thorpe took the benefit of the Insolvent Debtors' Act, and one William Thorpe was appointed his assignee. Shortly after the seizure by the sheriff, William Thorpe claimed the crops in his own right, and the other effects as assignee; whereupon the sheriff applied to the plaintiff Eyre, for an indemnity, which was refused. An indemnity was then required from William Thorpe, and ultimately given by him. The sheriff was now ruled by Eyre to return the fieri facias, which he did, by stating the seizure of the crops and other effects as above mentioned, and the claim, and that the other effects produced the sum of 57*l.* 10*s.* The sheriff at the same time offered the 57*l.* 10*s.* to Eyre, who refused to accept it. In Hilary Term, 1832, therefore, the sheriff obtained a rule calling upon the plaintiff and William Thorpe to shew cause why he should not be at liberty to bring the 57*l.* 10*s.* into court. And on the rule coming on to be argued, the Court ordered the same to be brought into court as prayed, to abide the event of the following issues, in which William Thorpe was named plaintiff, and Eyre defendant:—First, whether the crops taken under the execution were the property of the original defendant, Edward Thorpe, at the time of the execution. Secondly, whether, in respect of the other effects, Eyre's judgment was valid as against the creditors

of Edward Thorpe. The issues were tried at the Spring Assizes for Bucks, in 1833, and verdicts on both found for the plaintiff, William Thorpe. In May, 1833, William Thorpe, the plaintiff in the issues, died, and in October following, administration of his personal estate and effects was granted to one Hannah Dickinson and one George Thorpe. In Hilary Term, 1834, Eyre, the defendant in the issues, obtained a rule for a new trial which was silent as to costs. In June, 1834, George Thorpe was appointed assignee of the insolvent and original defendant, Edward Thorpe. In November, 1834, Hannah Dickinson, together with her husband, and George Thorpe, were, by rule of Court, appointed plaintiffs in the room of William Thorpe, deceased. At the Spring Assizes, 1835, the cause was taken down again and made a remanet. At the Summer Assizes, 1835, the cause was tried, when the first issue, as to the crops, was found for Eyre, the defendant, and the second issue, as to the other effects, for the plaintiffs. In Michaelmas Term, 1835, Eyre obtained a rule nisi for a new trial, which, in Easter Term, 1837, was discharged.

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Between the 25th and 30th of May, 1837, the following correspondence took place between the solicitor for the plaintiffs and the defendant Eyre's agent:—

“ Dear Sir “ Chancery Lane, 25th May, 1837.

“ Will your client consent to the money paid into court by the sheriff being paid over to the plaintiffs; and will he also consent to pay the costs of our appearing upon the sheriff's rules, and that his judgment be vacated?

“ Yours truly,

“ Mr. Miller.

“ HENRY C. CHILTON.”

“ Dear Sir, “ Chancery Lane, 29th May, 1837.

“ Unless I receive your client's determination, I must instruct counsel to apply to the Court, to prevent losing the term.

“ Yours truly,

“ Mr. Miller.

“ HENRY C. CHILTON.”

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“ Dear Sir,

“ 30th May.

“ Mr. Eyre has instructed me to say, in answer to your letter of the 25th of May, that he will consent to the money paid into court by the sheriff, being paid over to the plaintiffs to the use of the assignee of Edward Thorpe, but he will consent to the payment of no costs.

“ Yours truly,

“ Mr. Chilton.

“ THOMAS MILLER.”

In consequence of Mr. Eyre's refusal to pay any costs, the plaintiffs, on the 2nd of June, 1837, obtained the following rule:—

“ It is ordered that the plaintiff, upon notice of this rule to him or his agent, shall upon &c. shew cause why the sum of 57*l.* 10*s.*, paid into court by the sheriff of the county of Bucks, should not be paid out of court to the plaintiffs in the feigned issues directed to be tried by this Court, and why the costs of the last trial of the said feigned issues, and of the last application made by the plaintiff for a new trial, as also the costs of the appearance upon the sheriff's rules, and of this application, to be respectively taxed by the Master, should not be paid by the plaintiff to the plaintiffs in the feigned issues, upon the motion of Mr. *Andrews*.”

This rule came on to be argued on the 9th of June, when the Court, after hearing Mr. *Eyre* in person, and Mr. *Andrews* for the plaintiffs in the issues, was pleased to order as follows:—

“ It is ordered that the sum of 57*l.* 10*s.*, paid into court pursuant &c. by the sheriff of the county of Bucks, be paid out of court to the plaintiff in the feigned issues, and it is referred to the Master to tax the plaintiffs their costs of appearing upon the sheriff's rules obtained in this cause, which costs, when taxed, shall be paid by the plaintiff to the plaintiffs in the said feigned issues, or to their attorney: and it is further ordered, that the Master

shall tax the costs of the issues in the last trial in the usual manner."

In pursuance of this rule the Master taxed for the plaintiffs in the issues thus:—1. Their costs of appearing on the sheriff's rules as directed. 2. Their costs of "the issues in the last trial" in the "usual manner" as directed, including the costs of the trial. 3. Their costs of opposing Eyre's last rule for a new trial, which was discharged in Easter Term, 1837, as above stated. 4. Their costs of the application.

Eyre objected to this taxation on three grounds:—first, that the Master ought not to have allowed the costs of the last trial, but, on the contrary, should have limited his taxation to the costs of the pleadings only; secondly, that he ought not to have allowed the plaintiffs' costs of opposing Mr. Eyre's last application for a new trial notwithstanding his rule was discharged; thirdly, that the Court, when pronouncing the rule in question, expressly refused to give the plaintiffs in the issues the costs of the application.

Cur. adv. vult.

LORD DENMAN.—We think that the Master's taxation was right. It has been decided in several cases, that the words "costs of issues" include the costs of the trial also. Mr. Eyre having failed, it was proper to allow the costs of opposing the unsuccessful application for a new trial, as costs in the cause in the usual manner. The rule absolute is silent as to the costs of the application, but the plaintiffs were clearly entitled to them as costs in the cause also, for Eyre, by rejecting his opponent's proposal, compelled them to apply again to the Court for its further directions, not only as regarded the taxation of costs generally, but also as to the payment of the money out of Court. The plaintiffs virtually sustained the whole of their rule nisi. Mr. Eyre will therefore take no rule.

Rule refused.

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Issue joined in Michaelmas Vacation in a country cause, and notice of trial not given for the ensuing assizes, it is too early to move for judgment as in case of a nonsuit in Easter Term following.

HARRISON v. WILLIAMS.

V. WILLIAMS shewed cause against a rule nisi, obtained by *R. V. Richards* for judgment as in case of a nonsuit. It was a country cause. Issue was joined on the 14th of December, and no notice of trial was given for the Spring Assizes. The motion for judgment, as in case of a nonsuit, was applied for in Easter Term. The application, it was contended, was too early, and the case of *Apperley v. Morse* (a) was cited, where it was held, that if issue is joined in a country cause in Michaelmas Term, and no notice of trial is given, it is not too early to move for judgment as in case of a nonsuit in the following Easter Term. There, the defendant was entitled to a rule for judgment as in case of a nonsuit, because the issue was joined in Michaelmas Term, whereas, here, the issue was not joined until Michaelmas Vacation. That case must therefore be considered as an authority against the present application.

R. V. Richards, in support of the rule, cited *Evans v. Barnard* (b), which must be considered as in conformity with the case of *Apperley v. Morse*. The case of *Evans v. Barnard* was overruled by that of *Smith v. Miller* (c); *Apperley v. Morse* must consequently be considered as overruled.

WILLIAMS, J.—That case did not overrule the previous case, but decided that two assizes need not in all cases go by, before the rule for judgment, as in case of a nonsuit, is moved for.

R. V. Richards supported the rule, and cited *Robinson*

(a) Ante, p. 505.

(b) Id., p. 367.

(c) Id., p. 154.

v. Taylor (a) and Williams v. Edwards (b). From these cases, it seemed that no difference existed in the time at which the rule could be obtained, whether issue was joined in a particular term, or in the vacation following.

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WILLIAMS, J.—This was a motion for judgment as in case of a nonsuit made in Easter Term last. Issue was joined in December, and no notice of trial given in the Hilary Term following; and the question is, whether the motion was made too soon. It was made, I believe, in consequence of my having decided that where issue was joined in Michaelmas Term, the motion may be made in the Easter Term immediately after. The cases seemed to me to be involved in some doubt, how far two entire terms should not intervene between issue joined and the motion. After a good deal of consideration of those cases, however, and much inquiry made by the Masters amongst themselves and the officers of the other courts, I came to the decision above mentioned, chiefly upon the authority of a decision of my Brother *Littledale* expressly in point. The motion was made soon after in a case where a still shorter interval had elapsed since the issue was joined. A distinction between the cases might perhaps be made, either on the ground that the issue joined in vacation must be considered as of the ensuing term, or that when issue is so joined, the plaintiff ought not to be driven so speedily to give notice of trial. But probably, in matters of mere regulation and practice, the best and safest course is to consider what has been done, as the rule for what ought to be done afterwards; and as I can find no case, in which, under the circumstances, this motion was successfully made, and none

(a) Ante, Vol. 5, p. 518.

(b) 1 C. M. & R. 583.

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such has been suggested, I do not think I am warranted in originating what, so far as I know, is a new practice, and that, therefore, in this case the rule must be discharged.

Rule discharged.

SOLLY v. RICHARDSON.

A plaintiff, who obtains an order for amending his writ, is not obliged to draw it up; and if he gives notice of abandoning the order and the writ, and the defendant afterwards appears, a judgment of non pros., for not declaring, is irregular.

R. V. RICHARDS shewed cause against a rule nisi obtained by *Butt*, for setting aside a judgment of non pros. on the ground of irregularity. The facts, as they appeared from the affidavits, were these. On the 21st of November, 1837, a writ of summons was sued out; on the 29th of November, the defendant applied by summons to a Judge at chambers, to set aside the writ for irregularity. The ground of the application was, that the defendant had been sued by a wrong Christian name. On attending the summons, an order by the Judge, before whom it was heard, was made for amending, on payment of costs, the writ as to the point which formed the ground of objection. The attorney, however, declined drawing up an order for this amendment, abandoned his writ, and gave notice to the defendant's attorney of what he had done. He afterwards sued out a fresh writ in the Court of Exchequer for the same cause of action. The notice of abandoning the order and writ was given on the 1st of December, and on the 7th of the same month the defendant took out a summons to rescind the order, which the plaintiff had obtained for amending the writ. The defendant then entered an appearance to the writ. On the 9th of February following, his attorney gave notice to the plaintiff, that unless the costs due pursuant to the order of the Judge for the amendment of the writ were paid, judgment of non pros. would be signed for want of a declaration. The costs were not paid, and judgment of non pros. was signed. To set aside this non pros., the present rule was obtained.

Richards submitted that the plaintiff could not abandon his order for amending his writ, costs having been incurred. If no costs had been incurred, it might be that he was entitled to abandon his order. But here, some costs had been incurred, for the defendant was compelled to apply in order to set aside the writ.

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Butt, in support of the rule, contended that it was not obligatory on the plaintiff to act on the order which he had obtained for amending. The plaintiff put the defendant to no costs, but gave the defendant notice that nothing would be done on the order. Before appearance, it was quite clear that the plaintiff might abandon his writ, if no costs were incurred, and here none were incurred, unless the amendment was made, but that was not done.

Cur. adv. vult.

WILLIAMS, J.—This was a motion to set aside a judgment of non pros. for irregularity, under the following circumstances. The plaintiff had sued out a writ against the defendant in a wrong name; whereupon, the latter took out a summons calling upon the plaintiff to shew cause why the writ should not be set aside for that defect. Upon the hearing of that summons, the plaintiff obtained leave to amend the writ upon payment of costs: the plaintiff, however, did not think fit to draw up an order, but declined so to do, and in lieu thereof gave notice to the defendant, before the latter had appeared, that he (the plaintiff) had abandoned the said suit, and would not proceed thereon, and required the defendant not to appear. The defendant however, considering that what had been ordered about the amendment of the writ must be taken to have been actually done, entered an appearance, and signed judgment for want of a declaration; and the question is, whether he was right in so doing. It seems to me, that

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he clearly was not :—The order until drawn up amounted to nothing; and the plaintiff might equally forego the benefit of that as of any thing else done or ordered in his favour. The defendant, therefore, could not compel the plaintiff, who had chosen to adopt another course, to proceed upon the order; nor was he entitled to treat it as being in force, and to consider the amendments, which upon certain terms might have been made, as actually made. Upon this short ground, I think that what the defendant has done was wrong, and that the rule must therefore be made absolute.

Rule absolute, for setting aside the judgment
of non pros. with costs.



In the matter of CLEMENT DE BODE, BARON DE BODE.

A mandamus will not lie to the mere public depositaries of money, commanding the payment by them of a sum in gross.

A mandamus will not lie to the Crown or its servants, strictly as such, commanding it or them to pay over money in its or their possession in liquidation of claims on the Crown.

HILL (with whom was *Manning*) moved for a rule calling upon the Lords of the Treasury to shew cause why a writ of mandamus should not issue to them commanding them to pay the amount of the surplus paid by the Commissioners of Deposit mentioned in 59 Geo. 3, c. 31, to the Lords of the Treasury, or so much thereof as may be sufficient to indemnify the Baron de Bode for the loss of immovable property in Lower Alsace, in France, unduly confiscated by the French authorities, to the said Baron de Bode.

This motion was founded upon an affidavit stating the following facts :—

The Baron is the eldest son of the late Baron Charles de Bode, who was born at the family estate of Neuhoof, in the bishopric of Fulda; was a baron of the empire, and colonel of the German regiment of infantry of Nassau-Saarbruck, in the service of Louis XVI., king of France, by Mary his late wife, daughter of Thomas Kynnersley,

Esq., of Loxley Park, in the county of Stafford. Baron Clement was born at Loxley Park, 23rd of April, 1777, and was baptized at Uttoxeter. For many centuries before, the lordship of Sultz formed the principal part of the barony of Fleckenstein, in Lower Alsace; has been an ancient fief; descendible only in the direct male line; not liable to alienation or incumbrance; held immediately under the empire, though a fief de protection, of which the electors of Cologne were the lords-protectors, who, however, had no interest in the fief, except the right to require, and the obligation to afford, a stipulated military assistance to each other, with the right of appointing a new line of feudatories upon the failure of issue male. In 1720, upon the extinction of the male branch of the barons of Fleckenstein, investiture of this fief was granted by the then Elector to Hercules Meriadec, Prince of Rohan-Soubire. In 1786, upon the death of the last male descendant of this prince, Baron Charles de Bode obtained the investiture of the fief, for which he paid a large sum of money, partly constituted of the fortune of his said wife, remitted from England for that purpose, by way of customary acknowledgment or *douceur*, in respect of the grant of such investiture. This grant being formally ratified by the Chapter of Cologne, investiture was given by the officers of the Elector to Baron Charles as the first taker and feudatory for his life, and to Baron Clement, jointly with his father, as next in succession in the fief.

Previously to the peace of Westphalia, the provinces of Upper and Lower Alsace formed part of the German Empire, and were presided over by hereditary officers called Landgraves, which Landgraves were the territorial lords under the emperor and empire over certain districts within their respective landgraviates, but had no authority, jurisdiction, or seignory over the free imperial towns, or over the lands held by the barons of Fleckenstein, or by other members of the immediate nobility of the empire

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whose fiefs were situate within the ambit of the said landgraviates, except that the provincial prefecture of the ten free imperial towns situate in Lower Alsace (called also the prefecture of Hayenau) was held concurrently with the landgraviate of that province, to which provincial prefecture the property of and in certain villages was annexed. The Emperor of Germany and King of France, who had long been at war, were parties to the peace of Westphalia, and at the time of the negotiation for the said peace, the Archduke Ferdinand Charles, of Innsprück, held for his life the landgraviates of the Upper and Lower Alsace, and the provincial prefecture of the said ten imperial towns, the inheritance thereof belonging to the House of Austria.

By the treaty of Munster which treaty formed part of the peace of Westphalia, the Emperor of Germany, for himself and for the House of Austria, and also the empire, ceded to France all the rights which they had in the Landgraviates of Upper and Lower Alsace, and in the said provincial prefecture, and in the villages and other rights which were dependencies to the said prefecture, such landgraviates, prefecture, villages, and rights to be incorporated with the crown of France, with all jurisdiction, subject, however, to an express proviso that France should be bound to leave the barons of Fleckenstein and all the nobility of Lower Alsace, and also the ten imperial towns in the liberty and possession they had enjoyed theretofore as immediately dependant upon the empire ; so that, the said king should not claim any royal superiority over them, but should rest content with the rights which had belonged to the House of Austria, and which, by that treaty of pacification, were yielded to the crown of France, but without prejudice to the sovereignty acquired by France under that treaty in that which had belonged to the house of Austria.

By the treaty of peace concluded at Nimeguen in 1679,

between the empire and France, under the mediation and guarantee of England, it was stipulated that the provisions of the treaty of Munster should remain in as full force as if inserted word for word in the said treaty of Nimeguen. A similar ratification was included in the treaty of Ryswick in 1697, and in that of Paris in 1763, and again in the treaty of Versailles between England and France in 1783.

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In 1791, the late Baron Charles de Bode, being alarmed at the disturbances which had broken out in France, and being desirous that Sultz should vest immediately in possession in Baron Clement, his eldest son, made a public cession of all his rights in the said property, in the presence of the burghers and vassals of Sultz, in the name of Baron Clement, then only fourteen years of age, in whose name the late Baron from thenceforward administered and governed the said lordship of Sultz.

In the beginning of October, 1793, both left their residence at Sultz, and took refuge in the Austrian army; and on the 10th of that month it was decreed by the department of the Lower Rhine, in public session, that the individuals hereinafter named should be declared emigrants, and that all their property should be confiscated in order to its being sold or aliened, agreeably to the provisions of the laws relating to emigrants. The list of the names subjoined to the said decree were as follows:—

“J. Amann, N. N., deux freres de Seltz Bode,
de Sultz,”

after which followed other names. In pursuance of this decree Sultz was seized by the persons then exercising the powers of government in France, and thenceforward treated as national property. Part thereof was afterwards sold under the authority of the French government, and the residue continued in its possession until the restoration of the Bourbons in 1814.

Baron Charles died in Russia in 1797.

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By the 4th additional article of the definitive treaty of peace between England and France concluded on the 30th May, 1814, it was stipulated, that immediately after the ratification of that treaty, the commissioners mentioned in the 2nd additional article of it should undertake the examination of the claims of British subjects upon the French government, for the value of property movable or immovable unduly (*indûment*) confiscated by the French authorities, as also of the total or particular loss of the debts due to them or other property unduly detained under sequestration subsequently to 1792.

By the definitive treaty of peace between Great Britain and France, signed on the 20th of November, 1815, it was stipulated, that two conventions added to the treaty should have the same force and effect as if inserted therein. In one of these conventions, entitled Convention, No. 7, it was provided,—Article I., that British subjects having claims against the French government, who, in contravention of the 2nd article of the treaty of commerce of 1786, and subsequently to the 1st of January, 1793, had suffered in consequence of confiscation or sequestration decreed in France, and their heirs or assigns, subjects of his Britannic Majesty, should be indemnified and paid after their credits should have been recognised as legitimate, and the amount thereof should have been fixed.

The 5th article of the convention contains the regulations by which the amount due to British claimants, in respect of immovable property, was to be ascertained. By the 9th article, a capital producing an interest or annuity of 3,500,000 francs, to be inscribed in the great book of the public debt of France, was provided as a guarantee fund for such claimants, with a proviso, that if that amount should prove insufficient, further sums should be furnished to the extent of the claims (*a*). By the 12th article, the

(*a*) This unlimited liability on the part of France was afterwards commuted for the payment of a fixed additional sum in full. Vide post.

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period of three calendar months was allowed to claimants resident in Europe, to present their claims, and the 13th and 14th articles, directed the mode in which the claims should be examined. By the 2nd article of the said treaty of commerce of 1786, it was declared, that to secure from thenceforth the intercourse and friendship between the subjects of their majesties, and in order that their good understanding should be protected from all molestation or disturbance, it had been agreed, that if at any time any misunderstanding, interruption of friendship, or rupture should arise between the two Crowns, the subjects of each party residing in the territories of the other, should be allowed to continue their residence, and their business, without being in any manner disturbed, so long as they should conduct themselves peaceably, and should do nothing contrary to the laws. And that in case their conduct should render them suspected, and the respective governments should find themselves obliged to order them to withdraw themselves, there should be granted to them for that purpose, a term of twelve months to enable them to withdraw themselves with their property. All British subjects who have been indemnified for losses of immovable property, were placed on the list of emigrants, and such property was confiscated by the mere fact of their names being so placed, without any act denoting that they were British subjects. Out of the thirteen British claimants, indemnified in respect of immovable property, all but one had been naturalised in France. In December, 1815, Mackenzie, Newnham, Hammond, Morier, and Drummond, were appointed commissioners of liquidation, arbitration, and deposit, for the purpose of carrying the convention into effect, on the part of Great Britain. On the 19th of January, 1816, the British commissioner not having arrived in Paris, the baron presented his claim to the Duke de Richelieu, then prime minister and minister of foreign affairs in France, to be transmitted to the

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mixed commission, but this the duke omitted to do, under an impression, that as the baron's father was a German, he, though born in England, was not entitled to be considered as a British subject, and at the expiration of the three months allowed for the presentation of claims, on the 20th of February, 1816, the list of claimants was made up, without containing the baron's name. After the objection, with respect to the baron's nationality, had been obviated by an opinion given by Sir Samuel Romilly, the British commissioner neglected to insert the baron's name, as had been done in other cases, in consequence of a misapprehension on the part of the British commissioners, as to the situation of Alsace, which they supposed to have formed no part of the French territory before the revolution. In April, 1818, by another convention between Great Britain and France, for the final arrangement of the claims of British subjects upon the French government, it was agreed, that, in order to effect the payment and entire extinction of the capital and interest due to British subjects, there should be inserted in the great book of the public debt of France a perpetual annuity of three millions of francs. Upon the negotiations which terminated in this convention, the sum thus granted by France as a final arrangement of British claims, was increased for the specific purpose of providing for the loss sustained by the Baron of his property at Sultz. By 59 Geo. 3, cap. 31, after reciting the appointment of Mackenzie and the four others as such commissioners, and also reciting that the commissioners *had caused to be inscribed in a register the names of all the claimants who had presented themselves within the period prescribed by the convention*, and had liquidated and paid certain sums; and that Mackenzie, Newnham, and Hammond, had been appointed commissioners of arbitration, liquidation, and award, for the purpose of acting in England; and that Morier and Drummond had been appointed commissioners of deposit to

receive from France ; it was enacted that the commissioners should distribute the money to be provided by France *amongst the claimants whose names were duly entered in the said register*, and that payment of the claims on register by the commissioners should be a full discharge to the French government. The act then went on to provide that after payment of the *registered* claimants any surplus which might remain should be applied to such purposes as the Lords of the Treasury should direct. The baron not being aware that his name was not on the register, presented his claim before the British commissioners. The commissioners intimated that they were satisfied as to the baron's nationality, and raised no objection to his title to the indefeasible interest which he originally acquired in the property subject to his father's life estate; but they required him to shew that the property was in his actual possession at the time of the confiscation in 1793, and also that it had been confiscated on the specific ground that the owner was a British subject. The commissioners being of opinion that the baron had failed to establish either of these points, made an award of rejection in April, 1822. From this award the baron appealed to the Privy Council, who confirmed it on the former of the two grounds, being of opinion that the attempt on the part of Baron Charles to divest himself of his life interest in favour of his son was a fraud upon the French revolutionary government. The sum which had been set aside to meet the baron's claim being wanted for other purposes, the judgment of the Privy Council was immediately confirmed by the King, and 250,000*l.* was advanced out of this fund towards the completion of Buckingham Palace (a). The baron petitioned the Privy Council for a rehearing of his appeal, but the Council decided that they had no authority to rehear

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(a) This appropriation of the fund having been brought before the House of Commons some years afterwards, the amount was repaid.

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after their judgment had been confirmed by the King. The baron made several ineffectual attempts to bring his case before the House of Commons; and in 1834 he succeeded in obtaining the appointment of a select committee, "to examine into the facts and circumstances of his claim, and to report the same, with their observations thereon, to the House." At the close of the session, the committee reported, that without any fault in the parties, they had been unable to terminate the inquiry, and recommended that it should be renewed in the next session of Parliament. The dissolution of Parliament which followed having deprived the chairman of the committee of his seat, the baron made several ineffectual attempts to obtain the assistance of other persons to move for a re-appointment of the committee, and to undertake the office of chairman, but, in consequence of various disappointments and postponements, it was not made till the 18th of June, when the motion was opposed, on the ground that the baron, in not making the application earlier, had slept upon his rights, and the motion was negatived.

The affidavit concluded by stating the value of the property confiscated and not restored.

Hill then proceeded.—Whenever the baron has appealed to the Government or to Parliament for an investigation of his claims, the objection most pertinaciously urged has been, that whatever injustice the baron may have suffered, his claim has been disposed of by the decision of a competent tribunal. To this it has justly been answered, that the award of registration made by the commissioners, &c. was bad upon the face of it, as well from the absurd reasons upon which it purports to proceed, as from its omitting to adjudicate at all upon a large portion of the baron's claim, viz. that, in respect of the interest in remainder, supposing that no cession had ever been effectually made. The present application, however, proceeds

upon a ground wholly unaffected by this objection. The statute states, by way of recital, that the commissioners had duly inscribed in a register the names of all parties who had presented their claims within the period of three months limited by the convention. This recital is wholly untrue as far as the baron is concerned. Proceeding upon this mistaken assumption, the statute, in giving certain powers to the commissioners, confines their jurisdiction to those claims which had been duly registered. The baron's claim is therefore a casus omissus in the statute; and the effects of this omission are, first, to give to the registered claimants a statutory preference over any non-registered claimants; and, secondly, to withdraw the baron entirely from the jurisdiction of the commissioners and of the Privy Council, and to leave him to his original rights as created by the convention itself, though such rights, by reason of the enactment, can only be exercised against the surplus which may remain after satisfying the registered claimants. It cannot be necessary to contend that parties are not concluded by a recital in an act of Parliament (*a*).

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(*a*) "And further they said, that if the reference to the record had been left out, and the act had absolutely recited that the plaintiff was attainted of treason, and had confirmed it, yet the plaintiff might say that he never was attainted of treason, and so avoid the act entirely; for this recital cannot be taken to proceed but upon information, and the Court of Parliament may be misinformed as well as other courts; and when they have recited a thing which is not true, it cannot be otherwise taken but that they were misinformed, for none can imagine that they would purposely recite a false thing to be true, for it is a court of the greatest honour and justice,

of which none can imagine a dishonourable thing. And forasmuch as the Legislature always have justice and truth before their eyes, and their false recitals (if there are any) are made upon false information, from thence it follows that they do not intend any one to be concluded by such recital, grounded upon falsehood; for he that says to the contrary, affirms that their intent is to oppress men wrongfully, which is indecent to be said of them; and he who insists that some shall be concluded by such falsehood, impugns the intent of the makers of the act, and in that the act itself, for the act is nothing else but the intention of the makers of it."—*Plowd.* 398.

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The surplus is placed by the statute under the control of the Lords of the Treasury. But as the statute is silent as to any claimants whose names might not be inserted in the register, the rights of such claimants derived to them under the convention, to such part of the fund as was not appropriated by the legislature, remain unaltered. The right being in one party, and the possession having been placed by the law in another, the possession of the latter ought to be deemed to be held for the benefit of the former, and there being no other specific remedy for enforcing that right, the Court will interfere by mandamus. The baron is within the convention, and as a British subject, born in England, and of an English mother, (though the latter circumstance is unnecessary,) he contracted all the obligations and acquired all the rights of a British subject; and as his father was never naturalized in France, he has no pretensions to the character of a French subject. In France he was a foreigner, and but for the treaty of 1785, which abolished the droit d'aubaine as affecting British subjects, any property real or personal, of which the present claimant might have died possessed in France, would have gone to the King of France as the property of an Englishman, whereas the property of the other thirteen claimants in respect of losses of real property, with the exception of Boyd, would have passed unmolested to their descendants as *Frenchmen* by naturalization. Could it be seriously contended that Sir Samuel Romilly and Mr. Fonblanque, both of whom sat in the British Parliament, and Mr. Labouchere, who is not only in Parliament but a Privy Counsellor, all of whom were born of British mothers by foreign fathers, were not such subjects as would be entitled to the protection of our government against the spoliation of a foreign power, and that they should ever be specially excluded from participating in a fund actually obtained from the spoliators for the purpose of indemnifying the victims of their spoliation. If the baron was, by his birth,

as complete an Englishman as any of the persons just mentioned, did he cease to be so by inheriting a foreign title or by passing his youth in the military service of an allied sovereign, whatever foreign air these circumstances may, to the careless observer, throw over his person and his claim?

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If, as has been insinuated elsewhere, the acts of a revolutionary government are to be recognised and supported as being the acts of a government *de facto*, the argument would go only to shew that the French government would have been justified in refusing to make any compensation to those who had suffered by reason of revolutionary violence, not that compensation should be refused after a convention had been expressly entered into for the indemnification of those whose property had been unduly (*indûment*) confiscated in contravention of the treaty of 1786. No words could be introduced into a convention, which could shew more clearly that the conformity of any acts of spoliation with the existing laws and regulations of revolutionary authority was not to disentitle the claimant to redress, if he could shew that the acts of which he complained were in contravention of the provisions of the treaty of 1786.

Cur. adv. vult.

COLERIDGE, J.—This was an application on the part of the Baron de Bode, for a rule to shew cause why a mandamus should not issue to the Lords of her Majesty's Treasury, commanding them to shew cause why the amount of the surplus paid by the Commissioners of Deposit, under the 59 Geo. 3, c. 31, to the Lords of the Treasury, or so much thereof as may be found by the Lords of the Treasury to be sufficient to indemnify the Baron de Bode, for the loss of immovable property in Lower Alsace, unduly confiscated by the French authority, should not be paid to the said Baron de Bode.

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Considering that this was only an application for a rule to shew cause, I have heard it argued at unusual length, and taken time to look at the affidavits. The nature and importance of the application as regarded both the subject-matter and parties applied against, together with the fact that the claim now preferred has been adjudicated upon and rejected by a court of final appeal, though, as was alleged, extrajudicially, and without some of the evidence now laid before me, seemed to make it fitting that I should not refuse the rule, unless I entertained a very clear and considered opinion against it; nor grant it, unless, upon examination, I doubted the propriety of the decision already pronounced. The circumstances of the case upon the affidavits (and I must know them through no other means), are such as cannot fail to inspire a warm desire to render the applicant every possible assistance; and there are in it so many facts and so many disputable questions of law, that if it were necessary to pronounce judgment on them all, in order to come at the conclusion at which I have arrived, I certainly should not have trusted myself, sitting alone, with the responsibility of such a decision. In the view, however, which I take of this application, that will not be necessary; and believing the points on which I shall decide to be clear and free from doubt, there could be no real kindness to the baron in putting him to the expense and anxiety of a protracted inquiry: I should at the same time be guilty of injustice to the high officers, against whom the writ is prayed, and bring unnecessarily into question certain principles, with regard to the jurisdiction of this Court in cases of this sort, which experience shews it to be most important to maintain inviolate. I shall assume, for the sake of argument, almost every fact and position on which the baron's application has been rested, and these may in substance be thus shortly stated: that the baron is a British subject by birth; that either by virtue of the original investiture, he had, in 1792, a vested and

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inalienable reversion in or by the cession of his father, an immediate estate in possession in the barony mentioned in the affidavits, that by an unlawful act of the French government in 1793, his property was seized and plundered as being that of a British subject, and very heavy losses inflicted on him thereby; that he ought therefore to have been, and was in fact taken as one of those, in whose behalf, reclamations were made by the British government at the peace of 1814, and whose claims are contemplated as to be provided for by the conventions made in 1814 and 1815; that by no fault of his own, his claim having been duly preferred by him was not duly registered by the commissioners appointed in pursuance of those conventions, and that their rejection of it with the confirmation of their award by the Privy Council being extra-judicial do not preclude him from a further prosecution of it. I shall assume further, that all claims duly registered have been either satisfied in full or rejected, and that a surplus remaining of the sum paid by the French government, has been handed over by the commissioners to the Lords of the Treasury; and finally, I shall assume that their lordships have been required, and have refused to do the very act in substance which the writ prayed for is to command them to do. I assume all these things for the sake of argument. But, to avoid any misunderstanding, it is fitting that I should add, I am by no means satisfied at present as to some of them, that they are made out in fact, or sustainable in law. Upon the assumptions, however, it is only necessary for me to consider two points; first, the nature of the baron's right to any portion of the sum so handed over to the Lords of the Treasury; and secondly, the character, in which they received and hold it; for it is clear the writ of mandamus cannot issue, unless the baron has a specific legal right to that which he prays for, and this at the hands of those from whom he requires it. Upon the first of these points,

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it appears, that the British government acting under no obligation, which any municipal court of justice could have enforced, but in discharge of that duty which every government owes to its subjects, stipulated by convention with the French government for compensation to British subjects for property, which had been unduly confiscated. It was finally arranged between these high contracting parties, that the former on being paid a sum of money by the latter should place itself in the position of the French government, and undertake the liquidation of the British claims. In pursuance of this arrangement, a large sum of money was transferred into the names of British commissioners; and upon this being done, the British legislature intervened, and by the 59 Geo. 3, c. 31, provided for the total disposal of this sum. Certain of the British claims had been registered under regulations previously made and recognised by this act, and the whole sum was in the first instance made liable to those claims. Whether by so enacting, any moral injustice was done to unregistered claims is not a matter for inquiry here; no British court or subject can question, that if the whole sum had been absorbed by registered claimants their title would have been indefeasible, and no unregistered claimant could have applied successfully in a court of justice for any share. This, on that supposition, would have been the case of the Baron de Bode.

But it is said, that a surplus has remained, and that that surplus has found its way into the hands of the Lords of the Treasury, under such circumstances as constituted them public trustees for every just claimant as yet unsatisfied. The baron, it is said, is one of those claimants. It is true, that his claim has never by competent authority been established, liquidated, or reduced to a definite sum, nor has any specific portion of the surplus ever been allotted and appropriated to meet it: but his claim is a just one, is capable of proof; he has been guilty of no

laches in preferring it, and he has a right to have it liquidated, and a portion appropriated to it. This is the state of things on his side.

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On the other hand, what is the position of the Lords of the Treasury. They have received the surplus under the act of Parliament. By the 16th section, the commissioners were to invest the money for the purposes of being applied to the payment or liquidation of any such claims, that is, registered claims; or, in case all such claims shall be paid or liquidated, for such other purposes as the said Commissioners of the Treasury, for the time being, or any three of them, shall direct the said commissioners to apply the same.

Now, it is obvious, that *any* application of this surplus by order of the Treasury would have been an application under the act of Parliament; however unjust, no British court of justice could have afforded relief against it; the statute gives the Treasury an absolute discretion to order the purposes of its application. The commissioners must obey the order given by them, and the statute would have been the protection both for the one and the other.

Let it now be supposed, which is the most favourable supposition that can be made for the baron, that the Lords have made a simple order to pay it to themselves, and thus placed the fund under their immediate control. The money will then have been traced from the hands of the French government into those of the British government, charged with a solemn trust; by it disposed of to commissioners acting under a statute of the realm, and a portion of it by them returned into the hands of the servants of the British Crown. I may concede, that the solemn trust now revives, and in this state of things I am clearly of opinion, that two insuperable difficulties are presented to the baron's present application.

In the first place, his claim is unproved and unliquidated; he cannot call on the depositaries of a gross fund to pay

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him thereout any portion till he has reduced his demand to a certainty; he cannot call on these depositaries to ascertain his claim—they have no power so to do—no power to hear, to inquire, to take proofs, to determine; merely as depositaries they have none of these powers, and no law or statute has invested them specially with them.

In the second place, in what capacity do the Lords of the Treasury hold this fund? Most clearly, as the mere servants of the Crown. By the exercise of the royal functions the money was first obtained; the present claim has been properly admitted to be beside the parliamentary appropriation of any part of it; and the residue has now reverted to the Crown, and is in the hands of the Crown by its servants.

But, against the servants of the Crown, as such, and merely to enforce the satisfaction of claims upon the Crown, it is an established rule that a mandamus will not lie. I call this an established rule, and I believe it has never been broken in upon. There are circumstances, indeed, under which a mandamus will lie against the Lords of the Treasury, and a much misunderstood instance is the case of *Rex v. The Lords of the Treasury* (a): there it appeared *primâ facie*, that a pension had been granted; that funds applicable to its payment had been placed by Parliament in the hands of the Lords of the Treasury as *public officers charged by statute with the payment of such pensions*; that the Lords had allotted the fund for the payment, and acknowledged to the claimant that they held it for his use, and that they only refused to pay, because he declined to take it clogged with conditions which they had no right to impose. These were the facts on which the Court directed the mandamus to go, and no answer was given to them; but in so deciding, the Court did not im-

(a) 4 Ad. & El. 286; 5 Nev. & Mann. 589; and see 6 N. & M. 508.

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plicitly infringe, and they expressly affirmed, the doctrine that a mandamus will not lie against the Crown or its servants as such. It is only necessary to refer to the cases which are to be found in the same volume with *The King v. The Lords of the Treasury*. *In re Hand* (a), *In re Smith* (b), and *Ex parte Ricketts* (c), decided in strict consistency with the former case, but upon the distinction before adverted to, to perceive that the doctrine of the Crown's exemption from a mandamus, and of the Crown's servants equally, has not been brought into question by the Court of Queen's Bench in modern times. I have neither the power nor the inclination to shake it. Upon these grounds, I feel compelled to refuse this rule; and the importance of the case to the party, and as a matter of principle, have induced me to state my reasons at this unusual length. The case of the applicant has been set before me with extraordinary zeal, ability, and eloquence; nothing has been omitted that was likely to inform my mind or interest my feelings; of course, upon the statement of one side, I can form no opinion as to the actual merits; but this I may say, that if the decision to which I come should bar the applicant, as it has been represented, from his last hope of prosecuting his claim with success, I deeply lament such consequence, though the fear of it must not prevent me from dealing with his application as I think the case requires at my hands.

Rule refused (d).

(a) 4 Ad. & Ell. 934; 6 N. & M. 508.

(b) 4 Ad. & Ell. 976; 6 N. & M. 505.

(c) 4 Ad. & Ell. 939; 6 N. & M. 523.

(d) Where a right is sought to be established against the Crown

itself, the course prescribed by the common law is to address a petition to the King, praying that the claim of the petitioner, or as he is usually called, the suppliant, may be examined. As the prayer of this petition is grantable *ex debito justitiæ* it is called a petition of

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CORBET v. BROWN.

A mere request that a particular officer may be employed in the execution of process, does not constitute that officer a special bailiff of the party.

WIGHTMAN moved for a rule to shew cause why the rule requiring the sheriff of Northamptonshire to return a writ of *capias* should not be discharged, on the ground that the plaintiff had appointed a special bailiff. The affidavit on which the application was founded contained a memorandum from the plaintiff's attorney to the under-sheriff in these terms:—"I will thank you to direct the warrant to Reeve, if he is at home, and can return with the bearer hereof; if he is not at home, to any officer you think proper." The man Reeve was one of the bound bailiffs of the sheriff, and the warrant was accordingly directed to him. This Reeve did effect the arrest, but subsequently allowed the defendant to escape. The sheriff was afterwards ordered to return the writ. The present application was now made for the purpose of relieving the sheriff from the necessity of returning the writ, on the ground that as the plaintiff had appointed a special bailiff he had relieved the sheriff from the responsibility of enforcing the execution of the writ; and the defendant moreover, when taken by the special bailiff, was never transferred to the actual custody of the sheriff.

Richards cited *Forde v. Leche* (a), where the words, "Myself v. D., I inclose you a writ herein, and shall feel

right, and is in the nature of an action against the King, (4 Co. Rep. 58a,) by which all demands against the Crown, real, personal, or mixed, may be recovered, (Mann. Exch. Pract. 2nd ed. p. 84.) And a petition of right lies for unliquidated damages, (p. 22, E. 3, fo. 5,)

which was a proceeding to recover damages for an injury done to the suppliant's mills by the King's servants at Nottingham Castle diverting the course of the river Trent.

(a) 1 N. & P. 737.

obliged by your granting a warrant hereon, directed to Mr. M. and Mr. B. I shall write to Mr. B. in a day or two," were held to constitute the special appointment of the bailiff.

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COLERIDGE, J.—I think that I cannot grant a rule in this case, which is directly within the principle of the decision in the case of *Balson v. Meggat* (a). That case was decided by myself, and therefore I attach no other authority to it than that, in the judgment of Lord *Denman* in *Ford v. Leche*, his Lordship mentions my decision without dissenting from it, and my Brother *Patteson* agrees with it, and distinguishes it from *Ford v. Leche*. There the execution of the writ was expressly taken out of the hands of the sheriff, and confided to two persons directly appointed. Here, nothing of the kind has been done. The attorney merely mentioned the name of an officer with whom he was acquainted, and with whom he was in the habit of doing business, and desired that he should have the execution of the writ. That is a matter for the convenience of parties. A mere request that a particular person named should be employed, does not constitute him a special bailiff of the party. Under these circumstances, I cannot grant this rule.

Rule refused.

(a) Ante, Vol. 4, p. 557.

LEMON v. HOPSON.

ASHMORE shewed cause against a rule nisi obtained by *Wollaston* for judgment as in case of a nonsuit. The Where it was sworn, in answer to a rule for judgment as in case of a nonsuit, that the defendant was insolvent, but it did *not* appear that the plaintiff was unaware of the insolvency when he brought the action, the Court directed the rule to be discharged, unless the defendant consented to a *stet processus*.

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affidavit in answer stated that the defendant was insolvent, and therefore the plaintiff offered to consent to a stet processus. The Court would discharge the rule unless the defendant should consent to this course being pursued.

Wollaston, in support of the rule, contended that this rule ought to be made absolute, or that the plaintiff must give a peremptory undertaking. The affidavit in opposition to the rule, although it stated the insolvency of the defendant, did not state that the plaintiff was unaware of that fact at the time of bringing the action. As he did not swear that, it must be presumed that he was aware of it when he brought the action; if so, no reason was furnished for not proceeding to trial.

WILLIAMS, J.—I think that the present rule ought to be discharged, unless the defendant will consent to a stet processus.

Rule accordingly.

FLEETWOOD v. TAYLOR.

Where, on trial before the sheriff, a verdict is found for less than 5*l.* in favour of the plaintiff, the Court will not disturb it, on the ground of its being against evidence.

V. WILLIAMS shewed cause against a rule nisi obtained by *Godson*, for a new trial. The cause had been tried pursuant to a writ of trial, and a verdict found for the plaintiff, damages 3*l.* 5*s.* 5*d.* In this case, it appeared from the sheriff's notes, that there was evidence on both sides. Consequently, this case came within the principle of those in which the Courts had laid it down, that where a verdict was found in favour of the plaintiff, to an amount less than 5*l.* they would not interfere on the ground of the verdict being against evidence. The case of *Lyddon v. Coombes and Another* (a) recognised the principle previously laid down in *Packham v. Newman* (b).

(a) Ante, Vol. 5, p. 560.

(b) 1 C. M. & R. 585.

Godson, in support of the rule, contended, that whatever might be the course in other instances, the case here was different from those cited. Here, the objection to the verdict was, that the verdict was in fact a perverse verdict, for all the evidence here was on one side, there being none at all on the other.

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WILLIAMS, J.—The rule established now in all the Courts, is, that in cases before the sheriff, if a verdict is found in favour of the plaintiff, for a sum less than 5*l.*, that verdict is not allowed to be disturbed, on the ground of its being against evidence. Here, the verdict was for a sum less than 5*l.*, and although there is certainly very little in favour of the defendant, yet there was some. The application is consequently made on the ground of the verdict being against evidence. I think, therefore, that the present rule must be discharged.

Rule discharged.

AN

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1. Where an affidavit is sworn before a Commissioner of this Court in Vacation, it is "business depending in Court" within the meaning of the statute 11 Geo. 4, c. 70, s. 4, and is sufficient to confer a power on the

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Lord Chief Baron of the Exchequer to grant an order at chambers for the arrest of the defendant, the action being trover to recover bills of exchange. *Griffin v. Taylor*, 620

2. *Semble*, that it is not necessary the county in which an affidavit was sworn should appear in the jurat, if it does appear from the contents of the affidavit. *Rex v. Byrne*, 36

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1. Where an affidavit of debt states the defendant to be indebted in 304*l.* 4*s.* 7*d.*, "principal and interest," by virtue of an indenture covenanting to pay 300*l.*, the amount of principal and interest is sufficiently distinguished. *Jones v. Collins*, *Wright v. Collins*, 526

2. Stating a sum due "upon and for the balance of accounts between the defendant and the plaintiff," is insufficient in an affidavit of debt. *Ib.*

3. In an action on a bill of exchange by an indorsee against an indorser, the affidavit of debt must state the default of the acceptor, a statement that the amount "is now due and unpaid," will not supply the omission of that allegation. *Ib.*

4. An affidavit of debt, stating two causes of action, one imperfectly, and the other correctly, is not bad altogether, but the defendant may be held to bail for the latter if separate and independent of the former. *Ib.*

5. *Semble*, that an affidavit to hold to bail, stating the defendant to be indebted to the plaintiff "for money found to be due on an account stated between them," is sufficient. *Debenham v. Chambers*, 101

6. In an affidavit to hold to bail in case, for injury to plaintiff's reversionary interest in certain premises, it is sufficient to swear to the amount of damage according to deponent's "in-

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formation and belief," and it is no objection that the affidavit is made by the plaintiff's attorney, and not by a surveyor. *Hodgson v. Dowell*, 314

7. An affidavit to hold to bail stated defendant to be indebted upon a bill of exchange drawn and accepted by him:—*Held*, sufficient. *Harrison v. Rigby*, 93

8. Where an affidavit of debt alleged the defendant to be indebted to two persons for money lent by them and their late co-partner, the Court ordered the bail-bond to be delivered up to be cancelled upon an affidavit that the third partner was still alive. *Morrell v. Parker*, 123

9. An affidavit of debt, alleging the defendant to be indebted in 184*l.* on a promissory note "drawn and made payable for the like sum," is sufficient, and the amount of the note need not be more specifically mentioned. *Daley v. D'Arcy Mahon*, 192

10. The jurat of an affidavit sworn before a commissioner, stating it to have been received "by virtue of a commission forth," and omitting the word "issued," is sufficient. *Ib.*

11. An objection to an affidavit of debt, that it is not entitled in any Court must be taken within the time limited for entering an appearance, and, in the case of a prisoner, sickness does not excuse delay. *Ib.*

12. An affidavit of debt "for money found to be due upon an account stated," is sufficient, without alleging that it has been "settled," or that a "balance" has been struck. *Balmano v. May*, 306

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1. *Semble*, that a plaintiff who has demurred to a plea, and has obtained judgment, having obtained a Judge's order to amend, may efface that part of the cause of action from the declaration to which the plea was pleaded, without paying the costs of the demurrer. *Baden v. Flight*, 177

2. The Court will allow amendments as well in penal as in civil actions, unless delay is caused thereby. *Jones v. Edwards*, 369

3. Where, in a penal action, it was sworn that the plaintiff was insolvent, the Court refused to make it a condition of amendment that the plaintiff should give security for costs. *Ib.*

4. When an application is made at chambers to a learned Judge to make an order for an amendment of the declaration, the Judge has the power of determining the amount of costs to be paid, as the condition for making the order. *Collins v. Aaron*, 423

5. Where, in an action by a banking company, the names of two plaintiffs are improperly put on the record, the 7 Geo. 4, c. 45, s. 9, requiring the suit to be carried on in the name of any one of the officers of the company, the Court will allow the record to be amended, the defendant's costs occasioned thereby being paid, and will not require the action to be discontinued and re-commenced. *Holmes v. Pinney*, 627

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1. Where an order of reference directs "that the party in whose favour the award shall be made, shall be at liberty to sign final judgment for the amount which shall be payable thereunder, and tax his costs, and issue execution thereon for such amount, together with such costs so to be taxed," and the award is in favour of the defendant, the latter may sign judgment for his costs. *Maggs v. Yorston*, 481

2. Where, in an order of nisi prius, the whole cause and all matters in difference are referred to arbitration, the arbitrator is in the character of a jury, and shall find for the defendant on those issues only which are proved by him, even although it is directed that if the arbitrator shall find that the plaintiff is not entitled to recover any damages at all, a verdict shall be entered for the defendant. *Woolfe v. Cooper*, 617

3. By an order of Nisi Prius a verdict was entered for the plaintiff, subject to the award of an arbitrator. The plaintiff's attorney neglected to deliver the order of reference to the arbitrator until after the time for making the award had expired:—
Held, that it was irregular to try the cause a second time without getting rid of the previous verdict, and that such irregularity was not waived by

the defendant attending an order for the examination of the plaintiff's witness. *Hall v. Rouse*, 656

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ARREST (IRREGULAR).

If, after an irregular arrest, to the illegality of which the sheriff is no party, and which is afterwards set aside, the defendant is innocently detained by a person in another suit, the Court will not discharge him as to the detainer. *Ex parte Cogg*, 461

ARREST (WITHOUT PROBABLE CAUSE).

1. An application being made, under the statute 43 Geo. 3, c. 46, s. 3, by the defendant for his costs, and it being shewn that he was arrested for a sum of 28*l.*, which was made up of two amounts of 17*l.*, claimed on a bill of exchange, and 11*l.* for goods sold, and at the trial a verdict being returned for the plaintiff for the first mentioned sum, but the defendant having pleaded the Statute of Limitations, the claim for the second sum was abandoned, but it appearing, on an affidavit sworn by the plaintiff, that the defendant had frequently admitted the amount for the goods sold to be due:—*Held*,

ATTACHMENT.

that the defendant was not entitled to his costs. *White v. Prickett*, 445

2. In such an application, it is for the defendant to prove the want of reasonable and probable cause for the arrest. *Ib.*

3. A defendant will be entitled to his costs under the 43 Geo. 3, c. 46, s. 3, if he has been arrested for a larger sum than that found to be due, when the plaintiff ought to have known that he had not legal proof in support of his claim to the extent for which the arrest took place. *Robinson v. Whitehead*, 292

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1. An attachment for non-payment of money will not be granted, if the affidavit on which it is sought to bring the party into contempt describes the rule of court as an "order." *In the Matter of Turner*, 6

2. A body rule expired on the 20th at 11 o'clock; on the 17th, notice of justification was given for the 20th, but served after 11 o'clock. The bail attended accordingly, and the Judge made an order that they should have "three days' further time to justify," without prejudice to the question as to the sheriff being in contempt:—*Held*, that the meaning of the order was, "without prejudice to the sheriff being in contempt at the time of making the order;" and as the sheriff had the whole of the 20th to bring in the body, the Court set aside an attach-

ment subsequently granted against him, for irregularity. *Regina v. Sheriff of Middlesex*, 164

3. Capi corpus being returned by the sheriff to a writ of capias, without a Judge's order or rule of Court, and an order to bring in the body being disobeyed, the plaintiff is entitled to a rule absolute to make the order a rule of Court, and for an attachment under R. G. H. T. 3 Will. 4. *Bertram v. Davis*, 180

4. The Court will not dispense with personal service of a rule for an attachment, in a case where the person sought to be served is an attorney, and the attempts to serve him personally have been ineffectual. *Wilkinson v. Pennington*, 183

5. A demand of costs, which, by the rule, are payable to a high-sheriff, made under the authority of a power of attorney executed by the under-sheriff after the high-sheriff has gone out of office, is sufficient to support an attachment. *Reg. v. Matthey*, 515

6. Although husband and wife may be parties to a suit, an attachment for non-payment of costs will not be granted against the latter. *Doe d. Allanson v. Canfield*, 523

7. Where a rule for an attachment has been issued against the plaintiff for non-payment of costs pursuant to the Master's *allocatur*, for not proceeding to trial, and he subsequently pays the costs as well as the costs of the attachment, if it appears that the original rule requiring the costs to be paid, directed them to be paid to the defendant, and the demand is made by his attorney, the Court will not consider the plaintiff to be in contempt, but will order the costs of the attachment to be repaid to him. *Mason, Administrator, v. Whitehouse*, 602

8. Where the defendant is arrested on a capias, and in the copy served on him he is directed to put in bail in the Exchequer of Pleas, instead of in

the Common Pleas, his omission to put in bail in the Common Pleas does not afford a sufficient ground to induce the Court to grant a rule for an attachment against the sheriff for not bringing in the body. *Mayhem v. Hoadley*, 629

9. A demand by the attorney in the cause is sufficient to ground an attachment for non-payment of the costs of postponing a trial, although the Master has directed them to be paid "to the plaintiff." *Inman v. Hill*, 666

10. An application on the part of the sheriff on putting in bail, to set aside an attachment or stay proceedings on the bail-bond, must be grounded on an affidavit that such application is made "for his or their indemnity only." *Regina v. Sheriff of Cheshire*, 709

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1. The provisions of the statute 7 Will. 4 & 1 Vict. c. 56, are prospective only, and therefore an attorney commencing an action, before the act was in operation, in the Common Pleas, not being duly admitted an attorney of that court, is entitled to recover such costs only as were incurred after the passing of the act. *Newton v. Spencer*, 401

2. Affidavits in support of an application against an attorney to compel him to deliver up a document, may be entitled in the action out of which the claim arises, although judgment

has been signed and execution issued. *Simes v. Gibbs*, 310

3. An attorney is liable to the summary jurisdiction of the Court for misconduct, while one of its officers, although at the time of an application against him he has ceased to be an attorney. *Ib.*

4. An affidavit in support of a rule for an attachment against an attorney for not obeying an order of Court, not stating him to be an attorney of the Court in which the rule has been obtained, is sufficient, since 1 Vict. c. 56, s. 4. *Downton v. Styles*, 189

5. There is no implied contract with an attorney who subpoenas a witness, to pay the expenses occasioned by such subpoena. *Robins v. Bridge*, 140

ATTORNEY (ADMISSION OF).

1. Where a person was admitted as an attorney, but never took out his certificate, or practised for a period of 24 years from the time of his admission, the Court permitted him to take out his certificate without the form of re-admission. *Ex parte Marshal*, 526

2. The 15th of April, which by 11 Geo. 4 & 1 Will. 4, c. 70, s. 6, is constituted the first day of Easter Term, falling on Easter Sunday, a delivery, three days before the 18th April, of the notices for the admission of an attorney, was held to be a sufficient compliance with Reg. Gen. H. T. 2 Will. 4. *Ex parte Bayley*, 516

3. Where the delay on the part of an articulated clerk in sending in the answers required by Reg. Gen. E. T. 6 Will. 4, has been caused by the unexpected absence of the attorney with whom the articles were served, the Court will allow them to be sent in nunc pro tunc. *Ex parte Lyons*, 517

4. The Court will allow an attorney's notice for admission to be

amended, by introducing the name of one of the persons with whom he served his clerkship, and which had accidentally been omitted. *Ex parte Collins*, 495

5. Where a clerk has given his notices previous to E. T., for admission in T. T., but he does not apply for admission in that term, the Court will not allow him to be admitted on those notices in the following M. T.; but under peculiar circumstances, will enlarge his certificate, and allow him to give notice then of admission on the last day of H. T. *Ex parte Southern*, 26

ATTORNEY'S BILL (DELIVERY OF).

See PLEA, 14—TAXATION, 4, 5, 6, 10.

ATTORNEY (CERTIFICATE OF).

See ATTORNEY (ADMISSION OF) 1, 2.

1. Where an attorney has by accident omitted to enter his certificate at the Master's office, the Court will in the following year allow him to enter it nunc pro tunc. *Ex parte Gradon*, 5

ATTORNEY (CHANGE OF).

See NULLITY.

A person who has acted as attorney in the cause, cannot be changed without an order for that purpose, although he is not the attorney on the record. *May v. Pike*, 667

ATTORNEY (CHANGING NAME OF).

1. Where an attorney, whose name is on the roll, assumes an additional surname, the latter may be added to that already on the roll. *Ex parte Ware*, 311

2. When an attorney changes his

name, the Court of Common Pleas will not grant a rule for altering his name on the roll, by adding his new name to that which is already engrossed on it. *Ex parte Ware*, 463

ATTORNEY (CLERK OF).

See ATTORNEY (EXAMINATION OF), 2.

Where an attorney, to whom a clerk has been articled became insane during the clerkship, the Court allowed fresh articles entered into with another attorney to be inrolled. *Ex parte Darbell*, 505

ATTORNEY AND CLIENT.

See ATTACHMENT, 9.—TAXATION, 4.

ATTORNEY (EXAMINATION OF).

1. A clerk, under the age of 21, cannot be examined pursuant to Reg. Gen. H. T. 6 Will. 4. *Ex parte Cragg*, 256

2. Where a clerk, in consequence of his master's death, had not served during a certain period of the five years, but after the expiration of the five years, served an additional time equal to the period of his non-service, the Court allowed him to be examined. *Ex parte Tompkins*, 3

ATTORNEY-GENERAL.

See DEBT, 3.

ATTORNEY (POWER OF).

See AFFIDAVIT (ENTITLING), 1.

ATTORNEY (PRIVILEGE OF).

1. The provisions of 1 Vict. c. 56, s. 4, do not deprive an attorney of his privilege to be sued in the Court of which he has been admitted. *Prior v. Smith*. 299

2. A plaintiff cannot treat a plea of such privilege as a nullity. *Ib.*

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3. If the attorney has waived his privilege, his waiver must be replied.

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ATTORNEY (UNDERTAKING OF).

Where a plaintiff is improperly delayed in his action, in consequence of the defendant's attorney not fulfilling his undertaking to enter an appearance in due time, the Court will not compel the latter to give security for the debt and costs conditional on the plaintiff's obtaining a verdict. *Morris v. James*, 514

ATTORNEY (WARRANT OF TO PROSECUTE AND DEFEND).

See REG. GEN. p. 464.

AUCTION DUTY.

See CONTRACT (VOID).

AWARD.

See AFFIDAVIT (ENTITLING), 1.—ARBITRATION. — JUDGE'S CERTIFICATE.—TAXATION, 13.

1. Where, in an action which was referred to an arbitrator, there were two issues, but only one breach, and the arbitrator, in his award, directed a verdict to be entered on the first issue, with 1s. damages, and on the second issue with 13s. 4d. damages:—*Held*, sufficient. *Smith, Administratrix, v. The Festiniog Railway Company*, 190

2. A plaintiff is not entitled to the costs of an unsuccessful motion to set aside an award, although the improper construction which the defendant had put on the award induced the application. *Hocken v. Grenfell*, 250

3. In a submission to arbitration, four actions between distinct parties, and all matters in difference, were referred to the arbitrator; and the

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award omitting to decide upon a fifth action, pending between the parties, and of which the arbitrator had notice, was held bad. *Stone v. Phillips*, 247

4. A cause was referred to an arbitrator, who was to settle all matters in difference between the parties at law and in equity, so that he made his award by a certain day (with power of enlargement), to be delivered to the parties, or if either of them should be dead, to their personal representatives. The arbitrator was to be at liberty to make *one or more awards at his discretion*. At the time of the submission, two equity suits were pending, in which the parties to the action, and also certain infants, were concerned. Before any award was made, one of the parties to the equity suits died.

The arbitrator by his award ordered a verdict to be entered for the plaintiff, damages, 500*l.*, and also that the defendants should pay to the plaintiff 350*l.*, *for grievances not included in his declaration*:—*Held*, first, that the award was sufficiently final, although it did not dispose of the equity suits; secondly, that the circumstance of infants being parties to those suits did not invalidate it; thirdly, that the arbitrator's authority was not revoked by the death of one of the parties; and, lastly, that the award of 350*l.* was sufficiently certain. *Wrightson v. Bywater*, 359

5. Where an order of reference and enlargement of time have been made a rule of Court, it cannot be shewn as cause against an attachment for non-performance of the award, that there was no affidavit that the time was duly enlarged; but if in fact there is no such affidavit, the proper course is to move to set aside the rule of Court. *Barton v. Ranson*, 384

6. Where several causes are referred, and "the costs of the several actions, and of all matters and things relating thereto, shall abide the event

of the award;" and the arbitrator directs the costs of each action to be paid to the successful party in each suit, the award is good, although the same party has not succeeded in all the actions. *Jones v. Powell*, 483

7. After an award has been made, it is too late for the unsuccessful party to object that certain infants have been parties to the submission, and that certain other interested persons have not been parties to it. *Ib.*

BAIL.

See ATTACHMENT, 2, 8—BAIL-BOND, 2—DEPOSIT (IN LIEU OF), 2—REG. GEN. p. 394—SCIRE FACIAS, 1, 2, 3—VARIANCE, 2.

1. If an affidavit of sufficiency by bail, whether town or country, attempts to describe the property in respect of which it is sought to justify, the form given by the rules of T. T. 1 Will. 4, must be strictly adopted. *Weller's Bail*, 312

2. Bail must swear they are worth the required amount over and above *what will pay* all their just debts. *Edmunds v. Keats*, 359

BAIL (ADDING).

1. Where bail has been rejected on the ground of a technical objection, the Court will not allow bail to be added. *Elliott v. Gutteridge*, 255

BAIL-BOND.

See AFFIDAVIT (OF DEBT), 8—ATTACHMENT, 10—CAPIAS, 1.

1. On an application to stay proceedings on the bail-bond on payment of costs, the plaintiff will not be entitled to have the bond stand as a security, if a trial have not been lost at the time of moving for the rule. *Gale v. Hayworth*, 323

2. If the application be made at the instance of the bail, the Court

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will not impose terms on the defendant. 323

3. Where a bankrupt obtained his certificate under a third commission, the Court refused to cancel a bail-bond given upon arrest for a debt proveable under that commission, he not having paid 15s. in the pound under either of the former commissions. *Summers v. Jones*, 139

4. The plaintiff arrested the defendant on an affidavit for money lent and advanced. The defendant afterwards obtained a Judge's order to arrest the plaintiff, and the latter, in order to get discharged, made an affidavit inconsistent with his claim for money lent:—*Held*, that this was no ground for cancelling the bail-bond. *Vaughan v. Goadby*, 96

BALANCE.

See AFFIDAVIT (OF DEBT), 2, 12—COURT OF REQUESTS, 4—DECLARATION, 1—REG. GEN. p. 649.

BANKRUPT.

See BAIL-BOND, 3—EJECTMENT, 12—JUDGMENT (NUNC PRO TUNC), 2—MUTUAL CREDIT—PAYMENT (COMPULSORY)—PLEA, 9, 20—PLEA (ISSUABLE)—REPLICATION, 4—REPUTED OWNERSHIP—SECURITY (FOR COSTS), 3—TRIAL (BY PROVISIO).

BARRISTER.

1. A plaintiff who has been called to the bar since the commencement of an action, cannot claim his privilege in order to procure the venue in the action to be brought back from York to Middlesex. *Newton v. Harland*. 630

2. The privilege cannot be granted to a person joined with his wife in the action, whether they be plaintiffs or defendants. *Ib.*

CANDLEMAKER. 807

BARRISTER (REVISING).

See COURT OF REQUESTS, 5.

BATTERY.

See COSTS, 3.

BELIEF.

See AFFIDAVIT (OF DEBT), 6.

BILL OF EXCEPTIONS.

1. A bill of exceptions lies to the judge of a county court on a nonsuit. *Strother v. Hutchinson*, 238

2. Where, on the trial of a cause, the under-sheriff declined to sign a bill of exceptions, the Court refused to stay judgment and execution. *White v. Hislop*, 693

BILL (OF EXCHANGE).

See AFFIDAVIT (OF DEBT)—DECLARATION, 2, 3, 7—DEMURRER (FRIVOLOUS), 1—DEMURRER (SPECIAL)—INTEREST—JUDGMENT (NON OBSTANTE VEREDICTO), 3—MUTUAL CREDIT—PLEA, 2—PROCEEDINGS (STAYING)—REG. GEN. p. 647—REPLICATION, 7.

BILL (OF SALE).

See INTERPLEADER, 5.

BOND.

See DEBT, 4.

BREACHES.

See AWARD, 1—DEBT, 4.

BRIEFS.

See COSTS, 2—DISCONTINUANCE.

CANDLEMAKER.

See PLEA, 12.

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CAPIAS.

See ATTACHMENT, 3, 8—WRITS (SEVERAL).

1. Where the capias described the defendant as a "gentleman," but such description was omitted in the copy served, the Court ordered the bail-bond to be delivered up to be cancelled. *Cook v. Vaughan*, 695

2. If no date be stated in the copy of the capias served on the defendant, the arrest is irregular. *Smart v. Johnson*, 90

3. After a defendant has been in custody twenty-three days, it is too late to object to the copy of the writ of capias served on him at the time of his arrest, on the ground of its purporting to have been issued in the reign of Will. 4, although really issued in that of Victoria, as the application should have been made within the time for putting in bail. *Brashour v. Russel*, 185

4. *Semble*, that such an error does not make the arrest void, but merely irregular. *Ib.*

CAPIAS (AD SATISFACIENDUM.)

The omission of an original ca. sa. is no objection to a test. ca. sa., which has been issued without the former writ, although issued after an application is made to set aside the test. ca. sa. *Esdaile v. Davis*, 465

CASE.

See TRESPASS, 1, 5.

CENTRAL CRIMINAL COURT.

See TAXATION, 3.

CERTAINTY.

See AWARD, 4.

COMMISSION.

CERTIFICATE (OF JUDGE).

See COSTS, 3, 4, 5, 13—JUDGE'S CERTIFICATE.

CERTIFICATE (OF SLAVE COMPENSATION).

See SLANDER.

CERTIORARI.

See COMMITMENT, 3—PROCEDENDO.

1. *Semble* that a writ of certiorari cannot be had by the claimant of goods under a foreign attachment. *Wait v. Coombes*, 127

2. In such a case the joinder of issue with the claimant is a joinder of issue within the 21 Jac. 1, c. 23, s. 2, and therefore, if the writ could be had, it must be sued out within six weeks after that issue joined. *Ib.*

CHANCERY.

See SOLICITOR (UNDERTAKING OF).

CHEQUE.

See REPLICATION, 6.

COGNOVIT.

See PRISONER, 2.

COMMENCEMENT (OF ACTION).

See WRIT (OF TRIAL), 7.

COMMERCIAL CONTRACT.

See TIME (COMPUTATION OF) 1.

COMMON PLEAS OFFICERS.

See REG. GEN. p. 50.

COMMISSION.

See PLEA, 9.

COMMISSION.

See AFFIDAVIT, 1—AFFIDAVIT (OF DEBT), 10.

CONSOLIDATION.

COMMITMENT.

1. A commitment under the 6 Geo. 4, c. 125, s. 70, (the Pilot Act), is defective, if it does not allege the offer by a licensed pilot to have been made to the defendant, or in his presence; stating the offer in the words of the act is insufficient. *Regina v. Chaney*, 281

2. The writ of habeas corpus is not taken away by that act, and therefore the defendant is entitled to avail himself of defects on the face of the commitment. *Ib.*

3. The writ of certiorari is taken away by that act, and therefore, unless the Crown remove the conviction, the Court will consider the commitment, although defective, as a true recital of the conviction. *Ib.*

COMPANY.

See AMENDMENT, 5.—NOTICE (OF ACTION.)

COMPUTE (RULE TO).

See COUNTS (STRIKING OUT), 2.

CONDITION.

See AMENDMENT, 3, 4.

CONSENT RULE.

See REG. GEN. p. 465.—STAY OF PROCEEDINGS.

CONSIDERATION.

See DECLARATION, 5—PLEA, 2, 3.

CONSOLIDATION.

1. Where two actions were brought on policies of insurance by the same plaintiffs against different defendants, the Court refused to make a consolidation rule upon the terms of the plaintiff and the defendant being concluded by the verdict in one action, against the consent of the plaintiff.

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M'Gregor v. Horsefall, M'Gregor v. Smith, 338

2. The Court has not power to compel the relators and defendants in several quo warranto informations to submit to be bound by the result of one, although the objection in all is the same. *The King v. Cozens*, 3

CONSUL.

See FINES AND RECOVERIES, 1.

CONTEMPT.

See ATTACHMENT—TRESPASS, 3, 5—WITNESS, 2.

CONTRACT.

See ATTORNEY, 5—TIME (COMPUTATION OF), 1—WRIT (OF TRIAL), 2.

CONTRACT (VOID).

A purchaser of goods at an auction cannot, by refusing to pay the auction duty to which he is made liable by 17 Geo. 3, c. 50, s. 8, make the bidding void, and a plea therefore alleging the contract to be void on such a ground:—*Held*, bad on demurrer. *Malins v. Freeman*, 614

CONVERSION.

See PLEA, 10.

CONVICTION.

See COMMITMENT, 3.

COSTS.

See AMENDMENT, 1, 4, 5—ARBITRATION, 1—ARREST (WITHOUT PROBABLE CAUSE),—ATTACHMENT, 6, 7—ATTORNEY, 1—AWARD, 2, 6—COURT OF REQUESTS, 2—CRIMINAL INFORMATION—INTERPLEADER, 2, 3, 5—JUDGE'S (CERTIFICATE)—MANDAMUS, 1—NEW TRIAL—PROCEEDINGS (STAYING) REG. GEN. p.

647—SLANDER—STAY OF PROCEEDINGS, 2—TAXATION, 1, 4—WAIVER, 1.

1. Where a rule to refer a matter to the prothonotary has been moved without costs, and the subject for inquiry is matter of fact only, the Court will not entertain a substantive application for costs of the inquiry after the report of the prothonotary is made. *Holmes v. Edwards*, 51

2. Costs of obtaining admissions of documents, and of giving notice to produce documents at the first trial of an action, are costs in the cause, where a rule for a new trial has been obtained on payment of costs; but costs for preparing briefs may be allowed as costs of the trial, where the necessity for doing so is shewn. *Lord v. Wardle*, 174

3. The declaration stated that the defendant assaulted the plaintiff, and *seized and laid hold of him*, and imprisoned him. The defendant pleaded the general issue, and a justification to the whole. A verdict was found for the plaintiff, with one shilling damages, and the Judge certified under the 43 Eliz.:—*Held*, that the plea of justification admitted a battery, and that the plaintiff was entitled to costs, notwithstanding the Judge's certificate. *Rawlins v. Till*, 159

4. In an action on an attorney's bill, to which there was a set-off, the cause being partially heard, was referred to the Master, who was to enter into the whole account. The Master found a balance in favour of the plaintiff of 2*l.* 12*s.*:—*Held*, that the plaintiff was not entitled to costs upon the higher scale without the Judge's certificate. *Parker, Executrix, v. Serle*, 334

5. To trespass for breaking and entering plaintiff's stable, and taking a horse, defendant pleaded not guilty, that the stable was not the plaintiff's,

and leave and license. A verdict having been found for the plaintiff, with one farthing damages, the Judge certified under the 43 Eliz. c. 6:—*Held*, that the plaintiff was entitled to full costs, notwithstanding the Judge's certificate. *Purnell v. Young*, 347

6. Where a summons is taken out to stay proceedings on payment of a certain sum and costs, the refusal to accept that sum will not render the plaintiff liable to the subsequent costs.

But if the sum tendered be afterwards paid into Court, and accepted by the plaintiff, he will be liable to subsequent costs. *Gomer v. Elkins*, 335

7. The plaintiff having contracted with the defendant to serve him at a weekly salary, sued the defendant for wrongfully dismissing him from his service, and also for arrears of salary. After writ issued, a summons was taken out to stay proceedings, on payment of arrears of salary. This was refused, and the arrears were paid into court, and accepted by the plaintiff in full satisfaction.—*Held*, on motion to tax the defendant his costs, that the fact of the plaintiff having obtained a more profitable employment after action brought, was sufficient to rebut the presumption of a vexatious refusal of the sum tendered, and therefore the defendant was not entitled to his costs. *Cumming v. Columbine*, 373

8. The plaintiffs, being successful in the cause, are entitled to the costs of a special jury summoned on the process of the defendant, although the Judge shall not certify. *Jones v. Tobin*, 251

9. Where, in an action on the case for refusing to deliver goods out of the defendant's ship into the plaintiff's lighter, an issue is raised upon the tender of the bills of lading and freight, the costs of witnesses in attendance at the trial, but who are not

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called to prove the custom with regard to such tender, will not be allowed. 251

10. Where the plaintiff has brought an action against the defendant to recover a sum of 16*l.*, and the defendant offers him 13*l.* in satisfaction of his demand, which he refuses to take, and subsequently, on his proceeding with the action, the defendant obtains an order to pay 11*l.* 8*s.* into court, but neglects to proceed on it, in consequence of which the plaintiff takes subsequent steps, but eventually, on the money being paid into court, he accepts it, the plaintiff is entitled to costs only up to the time at which the order was made. *Parsons v. Pitcher*, 432

11. Trespass for breaking and entering the plaintiff's dwelling-house, &c. Pleas, not guilty, and that the dwelling-house was not the plaintiff's. A verdict was found for the plaintiff with one farthing damages:—*Held*, that he was entitled to full costs, notwithstanding 22 & 23 Car. 2, c. 9, s. 136. *Pugh v. Roberts*, 561

12. In actions for false imprisonment the plaintiff is entitled to full costs, though he recovers less than 40*s.* damages. *Booth v. Drake*, 564

13. To a declaration in trespass for breaking and entering the plaintiff's dwelling-house, and seizing his goods; the defendant pleaded, as to the breaking and entering, leave and license; and as to the residue of the cause of action, not guilty. A verdict was found for the plaintiff, with 6*d.* damages, and the Judge certified: *Held*, that the Judge had power to certify, it not appearing that the question of title was in issue. *Mills v. Stevens*, 593

14. Where a sum of money has been offered to a plaintiff in satisfaction of his demand, which he declines to accept, but subsequently, on its being paid into court with a plea of

COSTS (SET-OFF OF). 811

such payment, he takes it out, the Court will not interfere to give the defendant his costs, unless the case has previously been before the Master. *Roe v. Cobham*, 628

15. Where a defendant succeeds on some of several issues, he is entitled to the costs of the witnesses called *exclusively* in support of those issues, but not of those who were also examined to disprove the issues found for the plaintiff. *Crowther v. Elwell*, 697

16. The Court will not order a stranger to the record to pay the costs of an action, although it appears from the affidavit, that he is substantially a party to it. *Hayward v. Giffard*, 699

17. "Costs of issues" include costs of the trial of them. *Eyre v. Thorpe*, 768

18. Costs of opposing an unsuccessful application for a new trial, are costs in the cause. *Ib.*

19. If an application to take money out of court is granted, and the rule is silent as to costs, the successful party is entitled to the costs of the application. *Ib.*

COSTS (IN THE CAUSE).

See Costs, 18.

COSTS (OF THE DAY).

See STAY OF PROCEEDINGS, 2.

COSTS (SET-OFF OF).

1. In an action for an illegal seizure and sale of the plaintiff's goods under a warrant of distress, the declaration contained nine counts, two of which went to the whole value of the property, while the remainder went to the injury to the goods and the improper dealing with them. A verdict being entered for the plaintiffs on the first two counts, and for the defendants on the rest:—*Held*, that the de-

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defendants might set off the costs of those counts against the costs of the issues found for the plaintiffs. *Newton v. Harland*, 644

COSTS (OF TAXATION).

See TAXATION, 7.

COUNTERMAND.

See NOTICE OF TRIAL.

COUNTS (MISJOINDER OF).

See VENIRE DE NOVO, 2.

1. Counts for goods sold and delivered to the defendant *as executor*, and for work and labour done for the defendant *as executor*, cannot be joined with counts for money paid for the use of the defendant *as executor*, and for money due on an account stated with defendant *as executor*; but a count for money paid for the use of the defendant *as executor* may be joined with a count for money due on an account stated with defendant *as executor*. *Corner Executor v. Shone Executor*, 584

2. If goods, or work and labour, are contracted for in the lifetime of the testator, and the contract is completed in the time of the executor, the plaintiff cannot recover on the common counts for goods sold and work and labour, but must declare specially. *Ib.*

COUNTS (STRIKING OUT).

1. Where a declaration contains two counts, the first alleging a contract on the part of the defendants to carry certain goods from a place beyond the seas to the port of London, and the second alleging a further contract to convey the goods from the wharf, when they should be landed in London, to the plaintiffs' warehouse in Ironmonger Lane, for

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a further reward, the Court will not strike out one of the counts on the ground of its being in "apparent violation" of the 5th rule of R. G. H. T. 4 Will. 4, by which several counts are forbidden to be put on record, unless a distinct subject-matter of complaint is intended to be established in respect of each. (Per *Tindal*, C. J., *Park*, J., and *Bosanquet*, J.; *Collman*, J., dissentiente). *James v. Bourne*, 603

2. After the delivery of a declaration containing a count on a bill for 216*l.* 14*s.*, and also counts for goods sold and money due on an account stated, the defendant paid to the plaintiff 150*l.* generally on account of the action:—*Held*, that the plaintiff could not have a rule to compute, while the count for goods sold remained in the declaration. *Jones v. Shiel*, 579

3. Where, in an action of libel, the plaintiff demurs to the pleas to the second count in the declaration, takes issue on those pleaded to the first count, and replies *de injuria* to the pleas to the third count, and obtains judgment on the demurrer; the Court will not permit him to withdraw his replication to the pleas to the third count, and demur, on the ground that those pleas are open to the same objection as those before demurred to, but will permit him to withdraw the first and third counts of the declaration. *Delegal v. Highley*, 194

COUNTY.

See AFFIDAVIT, 2.

COUNTY COURT.

See BILL OF EXCEPTIONS, 1.

COURT (INFERIOR).

See COURT OF REQUESTS, 6.

COURT OF REQUESTS.

COURT OF REQUESTS.

See JUDGMENT (NON OBSTANTE VEREDICTO), 2—PAYMENT (COMPULSORY).

1. The Blackheath Court of Requests Act, 6 & 7 Will. 4, c. 120, s. 22, excepts from the jurisdiction of the Court any debt "for any sum being the balance of an account originally exceeding 5*l.*:"—*Held*, that the commissioners had jurisdiction, where the account contained items amounting to above 5*l.* and reduced by payments below that sum, *it not appearing that at any one time so much as 5*l.* was due.* *Pope v. Banyard*, 571

2. Under the Blackheath Court of Requests Act, 6 & 7 Will. 4, c. 120, when, in an affidavit, the defendant describes himself as of "the Mitre Tavern, Greenwich, in the hundred of Blackheath," and subsequently swears that "before and at the time of the issuing of the writ in this action by the plaintiff, he was wholly resident at the above tavern," there is sufficient proof of his residence within the jurisdiction of the Court of Requests, in order to entitle him to move to deprive the plaintiff of costs, the debt being under 5*l.* in amount. *Burton v. Campbell*, 451

3. Where, in the affidavits produced on the motion, there is no allegation of the amount of the debt for which the action is brought, but the copy of the writ of summons, with which the defendant was served, is annexed, indorsed that the plaintiff claims 4*l.* 2*s.* 6*d.* debt, that is sufficient proof of the action being brought for a sum "not exceeding 5*l.*" *Ib.*

4. A party suing in a superior court for the balance of an account, the original debt exceeding 5*l.*, but which has been reduced to 30*s.*, is not liable to costs, under the Tower

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Hamlets Court of Requests Act.
Green v. Bolton, 434

5. The Bath Court of Requests cannot award compensation for loss of time in attending the court of a revising barrister. *Roberts v. Humby*, 82

6. *Semble*, though a want of jurisdiction do not appear on the face of the proceeding, a prohibition may be awarded after sentence and execution, provided the party has not acquiesced in the jurisdiction of the inferior court. *Ib.*

COVENANT.

See AFFIDAVIT (OF DEBT), 1—DEBT, 2—RENT—TAXATION, 9.

COVERTURE.

See PLEA, 11.

CREDITOR.

See EXECUTION.

CRIMINAL CUSTODY.

See DISCHARGE (OF PRISONER), 1.

CRIMINAL INFORMATION.

If an affidavit to support a rule for a criminal information contains matter slanderous of the defendant, the Court will in some cases discharge the rule without costs. *Rex v. Byrne*, 36

CROSS-DEMAND.

See BAIL-BOND, 4.

CROWN.

See COMMITMENT, 3—EJECTMENT, 4
—HABEAS CORPUS—MANDAMUS, 3
—SUMMONS, 2—VARIANCE, 1.

CUSTODY.

See IMPRISONMENT.

CUSTODY (CRIMINAL).

See DISCHARGE (OF PRISONER), 1.

CUSTOM.

See INFERIOR COURT, 3.

DAMAGES.

See AWARD, 1—DEBT, 4—INTERPLEADER, 1—PAYMENT, 1, 3—REG. GEN. p. 649—SLANDER—TAXATION, 9—VENIRE DE NOVO, 2.

DAMAGES (UNLIQUIDATED).

See INTERPLEADER, 1—TAXATION, 9.

DATE.

See CAPIAS, 2—REG. GEN. p. 394—SIMILITER, 1—WRITS (SEVERAL).

DEATH.

See AWARD, 4—JUDGMENT (NUNC PRO TUNC) 2.

DEBT.

See MUTUAL CREDIT—PLEA, 3.

1. The declaration stated that the plaintiff complained of the defendant being detained &c. in an action on promises, and he demands of him the sum &c. which he owes to and unjustly detains from him. The first two counts were upon bills of exchange, and stated that the defendant promised the plaintiff to pay the same &c.: there were also indebitatus counts in debt, and the whole concluded "whereby an action hath accrued to the plaintiff to demand and have the said monies respectively &c., yet the defendant hath not paid &c.:" *Held*, that the first two counts were in debt. *Compton v. Taylor*, 660

2. By indenture certain lands were granted, bargained, sold, &c. to R. H. and the defendant, to the use and intent that the plaintiff should receive

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out of the land a clear yearly rent of 63*l.*, and the said R. H. and the defendant covenanted that they would well and truly pay the said rent to the plaintiff:—*Held*, that the debt could not be maintained for arrears of the annuity, but that covenant was the proper remedy. *Randall v. Rigby*, 650

3. An information in the nature of the popular action of debt cannot be maintained for the recovery of arrears of assessed taxes, (the 5 & 6 Will. 4, c. 20, s. 13, having made such debt recoverable as a debt upon record), but the proper mode of proceeding is by scire facias, extent, or by filing an information upon the record itself. *The Attorney-General v. Sewell*, 673

4. Where, in an action of debt on bond for securing a sum of money, payable by instalments, there are no breaches alleged in the declaration; but the defendant, in his plea, sets out the conditions and alleges performance, to which, the defendant replies that money is in arrear, it is competent for the jury to assess the damages on that issue, under the statute 8 & 9 Will. 3, c. 11, s. 8, without a special award of venire. *Scott v. Staky*, 714

DEBT AND COSTS.

See PRISONER, 2—PROCEEDINGS (STAYING)—REG. GEN. p. 647.

DECLARATION.

See AMENDMENT, 1, 4—COUNTS (STRIKING OUT), 1, 2, 3—DEBT, 1, 4—EJECTMENT, 2—JUDGMENT (NON OBSTANTE VEREDICTO)—LACHES, 1—NOTICE (SERVICE OF) VARIANCE, 2.

1. A general plea of payment must be taken to be pleaded to the particular sum for which the action is brought: therefore, where the defendant pleaded that he had paid to

DECLARATION.

the plaintiff sums amounting to the monies mentioned in the declaration; and it appeared that he had in fact paid such sums, but that the plaintiff went for a balance due beyond their amount:—*Held*, that the plaintiff was entitled to a verdict, and that it was not necessary for him to new assign. *Freeman v. Crafts*, 698

2. A declaration alleging a bill to have been made by F., requiring defendant to pay 1,500*l.* to him or his order, indorsed by F. to S. & Co., and by them *delivered* to the plaintiff, is bad, as not shewing a title in the plaintiff to sue. *Cunliffe v. Whitehead*, 63

3. In an action by the assignee of a bail-bond, it is not necessary to state that the assignment was under the hand of the sheriff, or in the presence of two credible witnesses, provided it be alleged to have been "according to the form of the statute," &c. *Lewis v. Parker*, 93

4. A count in assumpsit stated the defendant to be indebted to the plaintiffs and their deceased partner "for money found to be due on an account then stated between them;" and after laying the promise to the three, assigned as a breach that "the defendant had not paid:"—*Held* sufficient on special demurrer. *Debenham v. Chambers*, 101

5. The declaration stated that the sheriff had taken the plaintiffs' goods in execution under a writ issued on a judgment entered on a warrant of attorney, and thereupon, in consideration that the plaintiffs would give to the defendant two warrants of attorney, the defendant promised to cause the goods to be re-delivered:—*Held*, first, that a sufficient consideration appeared to support the promise, and that it was not necessary to set out the warrants of attorney; secondly, that it was not necessary to allege a request to re-deliver the goods. *Radford v. Smith*, 381

DELIVERING, &c. 815

DECLARATION (DELIVERY OF).

See TIME (COMPUTATION OF), 2.

DECLARATION (DEMAND OF).

See NON PROS., 1.

DECLARATION (ENTITLING).

See EJECTMENT, 2.

DEED (PRODUCTION OF).

1. Where there are four defendants, three of whom have suffered judgment by default, the three may be required by subpoena to produce a deed of partnership under which all four were acting with the plaintiff in the matters which gave rise to the action; but the Court will not make an order requiring them to produce the deed. *Colley v. Smith*, 399

2. The Court will not compel a plaintiff to produce a deed for inspection of the defendant, when the latter has no interest in the deed. *Smith v. Winter*, 386

DEFENDANTS (SEVERAL).

See CONSOLIDATION, 2.

DE INJURIA.

See PLEA, 3—REPLICATION, 1, 2, 3, 6, 7.

DELAY.

See AFFIDAVIT (OF DEBT), 11—AMENDMENT, 2—CAPIAS, 3—ESCAPE, 2—IMPRISONMENT—JUDGMENT (NUNC PRO TUNC), 42.

DELIVERY.

See DECLARATION, 2.

DELIVERING OF ATTORNEY'S BILL.

See PLEA, 14—TAXATION, 4, 5, 6, 10.

DEMURRER.

See AMENDMENT, 1 — CONTRACT (VOID)—COUNTS (STRIKING OUT), 3 —JUDGMENT (NON OBSTANTE VEREDICTO), 3—PLEADINGS (STRIKING OUT)—REPLICATION, 2, 3, 7.

DEMURRER (FRIVOLOUS).

1. In an action by indorsee against drawer of a bill of exchange, the declaration contained a count on the bill and on an account stated, with one promise to pay *the last-mentioned several monies* on request. The defendant having specially demurred on the ground that there was no promise to the count on the bill, the Court set aside the demurrer as frivolous. *Cheevers v. Parkington*, 75

2. Where, to counts for money lent, money had and received, and money due on an account stated, there was one demurrer, on the ground that they did not specify any time, the Court set aside the demurrer as frivolous. *Jackson v. Cawley*, 388

DEMURRER (SPECIAL).

Semble, that it is not necessary to allege a promise in a count on a bill or note. At all events, the omission can only be taken advantage of in an action by indorsee against indorser on special demurrer. *Griffith v. Roxburgh*, 133

DEPOSIT.

See PARTICULARS, 1.

DEPOSIT (IN LIEU OF BAIL).

See PAYMENT (COMPULSORY).

1. On an application under the 7 & 8 Geo. 4, c. 71, s. 2, to take money and costs out of Court, which have been deposited in lieu of bail, if the cause is in such a state that issue may be joined before the rule is disposed of, the Court will grant it,

DISCHARGE (OF PRISONER).

with a stay of proceedings. *Bloor v. Cox*, 266

2. Where a defendant has been arrested on a *capias*, and has deposited 200*l.*, the amount of the alleged debt, and 10*l.* for costs, in the hands of the sheriff, in pursuance of the 43 Geo. 3, c. 46, s. 2, but the sheriff, although frequently applied to, neglects to pay the money into court, until the evening of the day on which the time for putting in bail expired; and the defendant then, on the next day, under the 7 & 8 Geo. 4, c. 71, s. 2, pays an additional sum of 10*l.* into court for costs, but which the officers had refused to receive before the sum of 210*l.* was paid in by the sheriff; and the latter sum has been paid over to the plaintiff under a rule of court, against which the defendant had an opportunity of shewing cause; the Court will not order the plaintiff to refund the money, in order that its deposit may be considered as equivalent to putting in and perfecting bail. *Hannah v. Willis*, 417

DESCRIPTION.

See CAPIAS, 1.

DETAINDER.

See ARREST (IRREGULAR) — DISCHARGE (OF PRISONER), 2.

DIES NON.

See ATTORNEY (ADMISSION OF) 2—EJECTMENT, 7—HOLIDAY.

DISCHARGE (OF PRISONER).

1. A defendant having been arrested in his way to Court to deliver himself up into the hands of the Court of Queen's Bench to receive judgment on a conviction for conspiracy, the Court will only grant a rule nisi for his discharge on his own affidavit. *Sharplin v. Hunter*. 632

2. The facts being subsequently admitted by the plaintiff, the defendant will be discharged as to that case, but if any detainers are lodged against him, he will not be discharged as to them unless notice of the motion has been given to the parties concerned.

632

DISCONTINUANCE.

See AMENDMENT, 5—TAXATION, 4.

Where a plaintiff discontinues before he has given notice of trial, the defendant is, under no circumstances, entitled to the costs of preparing briefs. *Doe d. Postlethwaite v. Neale*,

166

DISCRETION (OF MASTER).

See COSTS, 1, 2, 4, 14.

DISTRINGAS.

1. When an application is made for a distringas, the affidavit should shew that the deponent believes the defendant to be resident in England; and when it is only alleged that inquiries have been made at the last "supposed" place of abode of the defendant, it is insufficient. *Esdaile v. Marshall*,

400

2. The defendant being insane, and a distringas having issued, to which there was a return of *nulla bona*, and *non est inventus*, but affidavits being produced that the defendant was a lunatic, that it was known where the defendant was living, but that his keeper refused to allow him to be seen, in order that process might be served: the Court refused to allow an appearance to be entered for him. *Starkie v. Skilbeck*,

52

DOCUMENTS (ADMISSION OF).

See COSTS, 2.

DRAWER (OF BILL OF EXCHANGE).

See AFFIDAVIT (OF DEBT), 7, 9—DEMURRER (FRIVOLOUS), 1.

DUPLICITY.

See PLEA, 2, 22—REPLICATION, 1.

DURESS.

See PLEA, 2.

EJECTMENT.

See JUDGMENT (AS IN CASE OF A NON-SUIT), 3—REG. GEN. p. 464, 465—SECURITY (FOR COSTS), 2—STAY OF PROCEEDINGS, 1.

1. Service in ejectment on the wife of the tenant in possession, it not being sworn that it was on the premises, or that she was living with her husband, is insufficient. *Doe d. Mingay v. Roe*,

192

2. The declaration in ejectment being entitled of "T. T. 1 Victoria," and that term not having arrived, the Court granted a rule for judgment against the casual ejector, the notice being right. *Doe d. Crooks v. Roe*,

184

3. In order to obtain the usual landlord's rule provided by 1 Geo. 4, c. 87, s. 1, the execution of the lease may be proved by the affidavit of a person who is not the attesting witness. *Doe d. Gomland v. Roe*,

35

4. A declaration in ejectment requiring a tenant to appear in "the King's Bench" is good, although, before leave is obtained to sign judgment, the Crown having demised, the Court has become "the Queen's Bench." *Doe d. Davies v. Roe*,

36

5. "Reading over" the declaration without "explaining" it, is insufficient in order to obtain judgment against the casual ejector. *Doe d. Wade v. Roe*,

51

6. In the notices attached to declarations in ejectment, each tenant being rightly named in his own notice is sufficient; and therefore, an alteration in the name of a tenant in the notices served on the others is immaterial, it being sworn that the same person is meant. *Doe d. Peach v. Roe*, 62

7. Service in ejectment on any of the days intervening between the Thursday next before, and the Wednesday next after Easter day, when they fall within Easter Term, is insufficient. *Doe d. Frodsham v. Roe*, 479

8. Under particular circumstances, the Court will dispense with the rule in this Court, requiring an application for judgment against the casual ejector to be made within the first four days of term. *Doe d. Davies v. Roe*, 461

9. It is no objection to a declaration in ejectment, that no attorney's name has been introduced into it. *Doe d. Simpson v. Roe*, 469

10. In ejectment for a close of land, proof of service of a copy of the declaration and notice, at the house of the tenant in possession, on a female, who, on the papers being explained to her, says she knows what they are, for that the lessor of the plaintiff had already been endeavouring to effect service, but could not; and by sticking another copy on the door of the house, is sufficient for a rule nisi for judgment against the casual ejector; and when the affidavit of service of the rule states the same person to have been served in a yard attached to the tenant's house, and that she is his servant, the rule will be made absolute. *Doe d. Wright v. Roe*, 455

11. Where ejectment is brought to recover possession of stables, service on the wife of the tenant, at his dwelling-house, is sufficient for

judgment against the casual ejector. *Doe d. Graef v. Roe*, 456

12. When the tenant in possession is a bankrupt, service on the messenger in possession of the premises and the bankrupt's goods under the fiat, and on the official assignee, is sufficient service on which to ground a rule for judgment against the casual ejector. *Doe d. Baring v. Roe*, 456

13. The omission of the allegation that John Doe is indebted to the Queen, and the "quo minus" in a declaration in ejectment, is immaterial. *Doe d. Bloxham v. Roe*, 388

14. Service on one of several joint tenants is sufficient against all. *Doe d. Clothier v. Roe*, 291

15. In country ejectment, if the notice is to appear in one term, judgment may be obtained against the casual ejector in the next term, without a rule nisi in the first instance. *Doe d. Croone v. Roe*, 270

16. Judgment cannot be signed against the casual ejector, in respect of a service on the daughter carrying on the business of the tenant in possession, who is a lunatic, and confined away from the premises. *Doe d. Brown v. Roe*, 270

17. Where an attorney, who is the attesting witness to the counterpart of a lease, is afterwards concerned for the tenant in an action of ejectment brought by the lessor, the Court will, notwithstanding, compel him to make an affidavit of the execution of the counterpart, in support of an application for the usual landlord's rule, under 1 Geo. 4, c. 87, s. 1.

Quære, whether the affidavit of the attesting witness is, in every case of such an application, indispensable. *Doe d. Avery v. Roe*, 518

18. Service, in ejectment, on the daughter of the tenant, coupled with the fact of the tenant's afterwards calling on the attorney of the lessor of the plaintiffs, and saying that he

knows that the time is coming "when something must be done," is sufficient ground for the Court to grant a rule for judgment against the casual ejector. *Doe d. Agar v. Roe*, 624

19. Where there are thirteen tenants in possession, and they have all been personally served, it is no objection to a rule for judgment against the casual ejector being granted, that the Christian names of two of them have been omitted in all the notices. *Doe d. Smith v. Roe*, 629

20. The Court will grant a rule for judgment against the casual ejector, although in the notice served on two of the tenants, the Christian name of a third tenant is omitted. *Doe d. — v. Roe*, 629

21. The notice at the foot of a declaration in proceedings by ejectment pursuant to 1 Geo. 4, c. 87, s. 1, must require the tenant to appear on the *first day of term*, whether it is a country or a town cause. *Doe d. Holder v. Rushworth*, 712

22. Service in ejectment on the son of the tenant in possession on the premises, is insufficient, unless it be shewn that he is living with his parent, and composes part of the family. *Doe d. Emerson v. Roe*, 736

23. Service of a declaration in ejectment on the son of the tenant on the premises, is sufficient for a rule nisi for judgment against the casual ejector, where it seems reasonable to suppose that the declaration has come to the tenant's hands. *Doe d. Timmins v. Roe*, 765

24. Special service in ejectment. *Doe d. Colson v. Roe*, *Ib.*

25. When there were four adjoining houses, and three of the tenants had been personally served, but the fourth having left the premises, the declaration was affixed to the door of the house, the Court granted a rule nisi for judgment against the casual

ejector, to be served in the same way as the declaration. *Doe d. Hindle v. Roe*, 593

26. The lessor of the plaintiff in ejectment, who was a mortgagee, obtained judgment, and after more than a year and a day had elapsed, without reviving the judgment by sci. fa., issued a hab. fa. poss., which, after execution, was set aside by a Judge's order; but the judgment left in force. On a motion for a rule for a writ of restitution:—*Held*, that such writ could not issue; but the rule might be moulded so as to order the lessor of the plaintiff to restore possession.

Semble, per *Patteson, J.*, that a party having recovered in an ejectment, cannot, by his own act only, and without the authority of the Court, take possession. *Doe d. Stevens v. Lord*, 256

ESCAPE.

1. Permitting a defendant in the custody of the sheriff, against whom a ca. sa. has been lodged, to go out of prison, is a *voluntary* escape, although the act of the sheriff was caused by mistake. *Filewood v. Clement*, 508

2. A sheriff, therefore, has no right to retake a defendant; and if he does, the caption being a nullity, lapse of time will not be an objection to the defendant's discharge. *Ib.*

ESTOPPEL.

See INFERIOR COURT, 1.

EVIDENCE,

See COURT OF REQUESTS, 3—INFERIOR COURT, 3, 5—STAMP, 3—WARRANT (OF ATTORNEY), 1.

EXCUSE.

See REPLICATION, 7.

EXECUTION.

See COUNTS (JOINDER OF), 1, 2—OYER
—WARRANT (OF ATTORNEY), 2.

EXECUTION.

See ARBITRATION, 1—ATTORNEY, 2
— EJECTMENT, 26 — INFERIOR
COURT, 1, 2, 5—LACHES, 3—TAX-
ATION, 11.

The delivery of a writ of fi. fa. to the sheriff only binds the goods of the defendant, so as to enable the execution creditor to pursue his claim; but, subject to that, the defendant may deal with the goods as he pleases, and if he dispose of them in market overt, the right of the sheriff ceases altogether. *Samuel v. Sir J. Duke*,
536

EXTENT.

See DEBT, 3.

FALSE IMPRISONMENT.

See COSTS, 12.

FELON.

See TAXATION, 3.

FEME COVERT.

See FINES AND RECOVERIES, 1 —
PLEA, 11.

The Court will discharge a married woman on entering a common appearance, unless the plaintiff swears that at the time of making the contract, she represented herself to be a feme sole. *Hollingsdale v. Lloyd*,
565

FEME SOLE.

See FEME COVERT.

FIAT.

See PLEA, 9.

FINES AND RECOVERIES.

1. An affidavit of verification of the certificate of the acknowledgment

GARNISHEE.

of a married woman under the Fines and Recoveries Act, the parties being resident in Germany, must be sworn before a native court, and an affidavit sworn before the English Consul is not sufficient. *In re Eady*, 615

2. It is no objection to an affidavit sworn before a native court, that it is originally in the German language, if it is translated, and the translation verified: and the oath may be administered in the German language if it is translated by an interpreter to the deponent. *Ib.*

3. It is sufficient that the affidavit should be signed by the Judge of the country, and that the deponent's signature should not be attached, the Judge's signature being verified, and an affidavit being produced that such is the course of practice in Germany. *Ib.*

FIRE.

See INFERIOR COURT, 5.

FOREIGN ATTACHMENT.

See CERTIORARI, 1—INFERIOR
COURT, 4.

FOREIGN COURT.

See FINES AND RECOVERIES, 1, 2, 3.

FOREIGN LAW.

See FINES AND RECOVERIES, 1, 2, 3.

FRAUD.

See INTERPLEADER, 5.

FRAUDS (STATUTE OF).

See PLEAS (SEVERAL), 2.

GAMING.

See REPLICATION, 6.

GARNISHEE.

See INFERIOR COURT, 2, 3.

HOLIDAY.

GARNISHER.

See INFERIOR COURT, 2, 3.

GENERAL ISSUE.

See PLEA, 4, 7, 17—REG. GEN, p. 649.

GENTLEMAN.

See CAPIAS, 1.

GOODS (SOLD & DELIVERED).

See INTEREST—JUDGMENT (NON OBSTANTE VEREDICTO) 2—REPLICATION, 5.

GUARANTEE.

See SET-OFF.

HABEAS CORPUS.

See COMMITMENT, 2—PARENT AND CHILD.

The Court granted an application on behalf of a prisoner to amend the teste of a writ of habeas corpus sued out at his instance, it being tested of T. T. "1 Victoria," instead of "7 William 4." *Ex parte Davies*, 181

HABERE FACIAS POSSESIONEM.

See EJECTMENT, 26.

HOLIDAY.

See ATTORNEY (ADMISSION OF), 2—EJECTMENT, 7.

The plaintiff in the action having replied de injuriâ, and added a similiter, delivered his pleading on the 11th of April. Good Friday fell on the 15th of the same month, and it was held that the succeeding days up to the 18th, being made dies non by the rule of E. T. 2 Will. 4, the defendant was in time that day to strike out the similiter, and demur to the replication. *Harrison v. Tait*, 611

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IMPRISONMENT (FALSE). 821

HOUSE OF LORDS.

See PLEA, 16.

HUSBAND AND WIFE.

See ATTACHMENT, 6—BARRISTER, 2—EJECTMENT, 1—TRESPASS, 2.

When a feme sole married before declaration, and the plaintiff nevertheless proceeded against her to final judgment and took her in execution, the Court refused to discharge her, it not being sworn that she had no separate property. *Evans v. Chester*. 140

IDENTITY.

See EJECTMENT, 6.

ILLEGALITY.

See PLEA, 4, 8—REPLICATION, 5, 6.

ILLNESS.

See AFFIDAVIT (OF DEBT), 11.

IMMATERIAL OMISSION.

See AFFIDAVIT (OF DEBT), 10.

IMPLEADED.

See WRIT (OF TRIAL), 7.

IMPRISONMENT.

Where the actual imprisonment of a defendant in the county gaol follows the arrest in due course, the commencement of the imprisonment under the 34th section of the statute 7 Geo. 4, c. 57, shall be taken to be the arrest, but where there is any improper delay, the imprisonment shall not be taken to begin until the defendant is in actual confinement within the walls of a prison. *Yapp v. Harrington*, 55

IMPRISONMENT (FALSE).

See COSTS, 12.

III

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822 INFERIOR COURT.

INDENTURE.

See AFFIDAVIT (OF DEBT), 1.

INDEPENDENT ALLEGATION.

See AFFIDAVIT (OF DEBT), 4.

INDORSEE.

See AFFIDAVIT (OF DEBT), 3—DEMURRER (FRIVOLOUS), 1—(SPECIAL)—DECLARATION, 2—REPLICATION, 1, 7—VARIANCE, 2.

INDORSER.

See AFFIDAVIT (OF DEBT), 3—DEMURRER (SPECIAL)—VARIANCE, 2.

INDORSEMENT.

See LOCAL COURT—LACHES, 5, 6.

INDORSEMENT (OF DEBT AND COSTS).

See LOCAL COURT.

It is not necessary to indorse the amount of debt and costs on a writ sued out to recover penalties under the Municipal Corporation Act (5 & 6 Will. 4, c. 76, s. 54). *Davies v. Lloyd,* 173

INFANT.

See ATTORNEY (EXAMINATION OF), 1—AWARD, 4, 7—PARENT AND CHILD—SECURITY (FOR COSTS), 2.

INFERIOR COURT.

See COURT (OF REQUESTS), 6—PROCEDENDO.

1. Where an issue was raised on the fact of an execution in the Lord Mayor's Court, in the city of London, it was held that the jury were not precluded, by the production of the record of that court, from finding the real facts of the case. *M'Grath v. Hardy,* 749

INTEREST.

2. Without execution executed, the garnishee is not discharged. 749

3. The mere fact of an attorney being the partner of the attorney who acted for the garnishee in the Mayor's Court, does not render him incompetent to prove the custom of that court. *Ib.*

4. To a plea of a foreign attachment in the Mayor's Court, it is not a good replication that no notice was given to the defendant in that court. *Ib.*

5. Where the original judgment in an inferior court has been destroyed by fire, the Court will allow execution to be issued under a verified copy of the judgment. *Cheesewright v. Franks,* 471

INFORMATION.

See DEBT, 3.

INJUNCTION.

See SUPERSEDEAS, 3.

INQUIRY.

See SLANDER—TAXATION, 9.

INSOLVENT.

See AMENDMENT, 3—IMPRISONMENT—JUDGMENT (AS IN CASE OF A NON-SUIT), 4—PLEA, 1, 5—REPUTED OWNERSHIP.

INSTALMENTS.

See DEBT, 4.

INSURANCE.

See CONSOLIDATION, 1.

INTEREST.

See AFFIDAVIT (OF DEBT), 1.

Where goods are sold, to be paid for by a bill, which is in fact never given, the plaintiff may, under the

INTERPRETER.

count for goods sold and delivered, recover interest for the amount from the time when the bill would have become due. *Farr v. Ward*, 163

INTERPLEADER.

1. The 1st section of 1 & 2 Will. 4, c. 58 (the Interpleader Act), does not apply to actions for unliquidated damages. *Walter v. Nicholson*, 517

2. An application by a successful party, in an issue directed under the Interpleader Act, for costs, &c., may be made before judgment actually signed, but the rule cannot be drawn up, except on condition of its being signed. *Bland v. Delano*, 293

3. Unless the sheriff has been guilty of misconduct, the Court will not order him to pay costs, &c., in an issue directed by the Court, in case of a default by the unsuccessful party. *Ib.*

4. The Court will allow a sheriff to deduct the expenses of a sale effected by the authority of the Court, under the Interpleader Act, although it appears, on the trial of an issue, that the seizure was wrongful. *Ib.*

5. Where goods were taken in execution, and a claim was set up under a bill of sale which bore date after the levy, the Court discharged the sheriff's application for relief, and made him pay the costs of the execution-creditor. *In re the Sheriff of Oxfordshire*, 136

6. A sheriff is not entitled to relief under the Interpleader Act, unless he has actually seized or is in possession of the goods. *Holton v. Guntrip*, 129

INTERNATIONAL LAW.

See FINES AND RECOVERIES, 1, 2, 3.

INTERPRETER.

See FINES AND RECOVERIES, 1, 2, 3.

JUDGE'S CERTIFICATE. 823

IRREGULARITY.

See ARBITRATION, 3—CAPIAS, 4—LACHES, 1, 3—NON PROS. 2—PROCESS (SERVICE OF)—TAXATION, 11—TRIAL (NOTICE OF), 2—WAIVER, 1—WRIT (OF TRIAL), 5.

ISSUE.

See JUDGMENT (AS IN CASE OF A NON-SUIT), 7—SIMILITER, 3—VARIANCE, 3—WRIT (OF TRIAL), 5.

ISSUE (JOINED).

See DEPOSIT (IN LIEU OF BAIL), 1.

ISSUES (SEVERAL).

See AWARD, 1—Costs, 15, 17—Costs (SET-OFF OF).

ISSUES (TRIAL OF).

See INTERPLEADER, 4.

If, in an action *ex contractu*, the defendant pleads in denial or discharge of the action, and also pays money into court, each issue must nevertheless be tried as if it stood alone on the record. *Fischer v. Aidé*, 594

ISSUABLE PLEA.

See PLEA (ISSUABLE).

JOINT TENANTS.

See EJECTMENT, 14.

JUDGE'S CERTIFICATE.

See Costs, 3, 4, 5, 13.

A cause being partly heard before a Judge, and a verdict taken for 119*l.*, subject to the award of an arbitrator, and the verdict being subsequently reduced by the award below 20*l.*, the Judge may grant his certificate that it was a proper cause to be tried before a Judge. *Broggref v. Hawke*, 67

JUDGE (AT CHAMBERS).

See AFFIDAVIT, 1.

JUDGE (ORDER OF).

See AMENDMENT, 1, 4.

JUDGMENT.

See AMENDMENT, 1—ARBITRATION,
1—ATTORNEY, 2—INTERPLEADER,
2, 3—INFERIOR COURT, 5—LACHES,
3—NON PROS., 3—PRISONER, 3—
TAXATION, 11, 12.

JUDGMENT (ARREST OF.)

See ARREST (OF JUDGMENT)—JUDG-
MENT (NON OBSTANTE VEREDICTO),
1—SIMILITER, 4—VENIRE DE NOVO,
1, 3—WRIT (OF TRIAL), 3.

1. A motion in arrest of judgment, or for judgment non obstante veredicto, must, in this Court (Exchequer), be made within four days of the time of trial if in term, and if not, within the first four days of the next succeeding term. *Thomas v. Jones*, 663

2. *Quære*, if the 65th section of 1 Reg. Gen. H. T. 2 Will. 4, applies to trials out of term? *Ib.*

JUDGMENT (AS IN CASE OF A NONSUIT).

See REG. GEN. p. 464—STAY OF PROCEEDINGS, 2—WITNESS, 1.

1. Issue joined in a *town* cause in Michaelmas Term, notice of trial not being given, it is not too soon to move for judgment as in case of a nonsuit in the following Easter Term. *Pierson v. Chessun*, 507

2. Issue joined in a *country* cause in Michaelmas Term, and no notice of trial given, it is not too early to move for judgment as in case of a nonsuit in the following Easter Term. *Apperley v. Morse*, 505

3. The 14 Geo. 2, c. 17, as to judgment in case of a nonsuit, applies

to actions of ejectment, as well as to other actions. *Doe d. Berger v. Docker*, 478

4. Where it was sworn, in answer to a rule for judgment as in case of a nonsuit, that the defendant was insolvent, but it did *not* appear that the plaintiff was unaware of the insolvency when he brought the action, the Court directed the rule to be discharged, unless the defendant consented to a stet process. *Lemon v. Hopson*, 735

5. Issue joined in Michaelmas Vacation in a country cause, and notice of trial not given for the ensuing assizes, it is too early to move for judgment as in case of a nonsuit in Easter Term following. *Harrison v. Williams*, 772

6. When issue was joined in a country cause on the day before Easter Term, and no notice of trial had been given:—*Held*, that the defendant might move for judgment as in case of a nonsuit, after one assize had elapsed.

But, where in such case issue is joined in Trinity Term, the motion cannot be made until the following Easter Term. *Evans v. Barnard*, 367

7. An affidavit, in support of a rule for judgment as in case of a nonsuit, alleging notice of trial to have been given, without stating the cause to be at issue, is sufficient. *Corbyn v. Heyworth*, 181

8. Where issue is joined in a country cause in Easter Term, and no notice of trial has been given, it is too soon to move for judgment as in case of a nonsuit in the following Michaelmas Term. *Smith v. Miller*, 154

9. Judgment as in case of a nonsuit absolute in the first instance, after a peremptory undertaking to proceed to trial in the sheriff's court, unfulfilled, may be obtained. *Willis v. Oakley*, 766

JUDGMENT (NON OBSTANTE VEREDICTO).

See JUDGMENT (ARREST OF), 1.

1. It is not a ground for arresting a judgment non obstante veredicto, that a plea, on which a verdict has been found in favour of the defendant, alleges money to have been paid into Court pursuant to 3 & 4 Will. 4, c. 42, s. 21, *before* declaration. *Edwards v. Price*, 487

2. To debt for goods sold, the defendant pleaded the Westminster Court of Requests Act. After plea, and before trial, that act was repealed by another, which contained no provision respecting actions then pending. A verdict having been found for the defendant:—*Held*, that the plaintiff was entitled to judgment non obstante veredicto. *Warne v. Beresford*, 157

3. In debt against the acceptor of a bill of exchange, defendant pleaded payment into Court of a certain sum, and that he was not indebted beyond that amount, pursuant to the form given by 17 Reg. Gen. H. T. 4 Will. 4, (Pleading Rules); the plaintiff took issue on the allegation that no more was due; the defendant had a verdict:—*Held*, that, although the plea might have been bad on special demurrer, as contrary to the rules of H. T. 4 Will. 4, with respect to such actions, yet that the plaintiff, having taken issue on the amount really due, he could not avail himself of the objection non obstante veredicto. *Finleyson v. M'Kenzie*, 71

JUDGMENT (NUNC PRO TUNC).

1. Judgment cannot be entered nunc pro tunc pursuant to 3 Reg. Gen. H. T. 4 Will. 4, (Pleading Rules), except where the delay arises from the act of the Court. *Vaughan v. Wilson*, 210

2. The plaintiff obtained an order, by consent, to enter up judgment on

a certain day, but neglected to take advantage of the order in consequence of proceedings taken to issue a fiat of bankruptcy against the defendant, and the latter having died before the fiat was issued, judgment nunc pro tunc was not allowed to be entered up. 210

JUDGMENT (TIME OF SIGNING).

See REG. GEN. p. 464.

JURAT.

See AFFIDAVIT, 2—AFFIDAVIT (OF DEBT), 10.

JURISDICTION.

See ATTORNEY, 3—COURT OF REQUESTS, 6—PLEA, 11—SECURITY (FOR COSTS), 4—TRESPASS, 1—WRIT (OF TRIAL), 3, 4.

JURY.

See ARBITRATION, 2—INFERIOR COURT, 1.

JUSTIFICATION.

See PLEA, 5.

LACHES.

See AFFIDAVIT (OF DEBT), 11—CAPIAS, 3—ESCAPE, 2—IMPRISONMENT—JUDGMENT (NUNC PRO TUNC), 1, 2—OUTLAWRY—PAYMENT, 1—STAMP, 1—TAXATION, 6—VENIRE DE NOVO, 3—WAIVER.

1. A variance between a declaration and the process is an irregularity, in respect of which an application should be made in vacation promptly to a Judge at chambers. *Tory v. Stevens*, 275

2. If such an application be made, and the Judge refuse to interfere, pleading a plea under protest during vacation is not such a waiver as will prevent the defendant from appealing to the Court. 16.

3. Where a plaintiff has arrested a defendant, declared, signed judgment, and charged him in execution, it is too late to make an objection to any alleged irregularity in the mode of arrest. *Cross v. Marsh*, 280

4. A Judge's order having been obtained on the 3rd May, to amend a declaration, the defendant is too late in coming to the Court on the 10th June, in Trinity Term, to set aside the order. *Baden v. Flight*, 177

5. Where a defendant was taken in execution on a test. ca. sa. in July, 1833, it is too late for him to object that there was no indorsement on the writ of his residence, pursuant to H. T. 2 & 3 Geo. 4, K. B., on the first day of H. T. 1838, although he swears that he was not aware of the defect until a short time before the application, as he was bound to be aware of the defect as soon as he was aware of the proceeding in which the defect arose. *Esdaile v. Davis*, 465

6. *Quære*, whether the above indorsement is for the benefit of the sheriff, or of the defendant also? *Ib.*

7. Where a writ of summons stated the defendant to be resident within the county of Worcester, whereas he in fact resided within the city of Worcester, and was served there:—*Held*, that an application to set aside the service should be made within the time limited for entering an appearance. *Child v. Marsh*, 576

LANDLORD AND TENANT.

See EJECTMENT, 3, 17.

LIBEL.

See COUNTS (STRIKING OUT), 3.

LIMITATIONS (STATUTE OF).

See ARREST (WITHOUT PROBABLE CAUSE), 1.

MANDAMUS.

LOCAL ACTION.

See VENUE.

LOCAL COURT.

The plaintiff, an apothecary, attended defendant's daughter, who did not reside with him, and his bill for such attendance amounted to 18*l.* 19*s.* 6*d.* The plaintiff also attended defendant's servant, and had delivered for such attendance a distinct bill, amounting to 1*l.* 0*s.* 6*d.* The plaintiff sued out a writ, indorsed 18*l.* 19*s.* 6*d.*; but, when he declared, inserted in his particulars his other claim of 1*l.* 0*s.* 6*d.* The defendant paid this latter amount into court, which the plaintiff took out in satisfaction. The defendant resided within the limits of a local court for the recovery of debts to the amount of 40*s.*:—*Held*, that, as the plaintiff had misled the defendant by the indorsement, he was not entitled to costs. *Thompson v. Gill*, 155

LORDS' ACT.

See PRISONER, 1.

In order to bring up a defendant under the compulsory clauses of the Lords' Act, the twenty days' notice must have expired before the first day of the term in which it is sought to bring him up. *Ralph v. Jacobs*, 279

LUNATIC.

See ATTORNEY (CLERK OF)—DISTINGUISHING, 2—EJECTMENT, 16.

MAGISTRATE.

See TRESPASS, 1.

MAKER.

See AFFIDAVIT (OF DEBT), 9—REG. GEN. p. 647.

MANDAMUS.

1. Where a rule for a mandamus

MORTGAGOR.

is made absolute, the costs of the application, pursuant to 1 Will. 4, c. 21, s. 6, must be made the subject of a separate application, and will not be considered by the Court on disposing of the rule. *Reg. v. The Justices of Salop*, 28

2. A mandamus will not lie to the mere public depositaries of money, commanding the payment by them of a sum in gross. *In the matter of Clement de Bode, Baron de Bode*, 776

3. A mandamus will not lie to the Crown or its servants, strictly as such, commanding it or them to pay over money in its or their possession in liquidation of claims on the Crown, *Id.*

MARKET OVERT.

See EXECUTION.

MARKSMAN.

See WARRANT (OF ATTORNEY), 4.

MASTER'S DISCRETION.

See COSTS, 1, 2, 4, 14—TAXATION, 1.

MAYOR'S COURT.

See INFERIOR COURT, 1, 3, 4.

MISPRISION (OF CLERK).

See SIMILITER, 5.

MONEY (HAD & RECEIVED).

See PLEA, 4—SET-OFF—WRIT (OF TRIAL), 2.

MONEY (PAID).

See PLEA, 7—PAYMENT, 4.

MORTGAGEE.

See EJECTMENT, 26—STAY OF PROCEEDINGS, 1.

MORTGAGOR.

See EJECTMENT, 26—STAY OF PROCEEDINGS, 1.

NOMINAL DAMAGES. 827

MOTHER.

See PARENT AND CHILD.

MOTION (NOTICE OF).

See DISCHARGE (OF PRISONER), 2.

MUNICIPAL CORPORATION ACT.

See INDORSEMENT (OF DEBT AND COSTS).

MUTUAL CREDIT.

See REPLICATION, 4.

Where a person puts his name to a bill of exchange for the accommodation of another, who afterwards becomes bankrupt, that is a credit likely in its nature to end in a debt, and may form the subject of a "mutual credit" within the 6 Geo. 4, c. 16, s. 50. *Hulme and Another, Assignees of Smith v. Mugglestone*, 112

NEGLIGENCE.

See PLEA, 17.

NEW TRIAL.

See COSTS, 18—WRIT (OF TRIAL), 1.

In the Court of Queen's Bench, if a new trial has been granted on payment of costs, the Court will not point out in the rule a particular day on which the costs must be paid. *Bland v. Warren*, 21

NIL DEBET.

See PLEA, 18.

NISI PRIUS.

See ARBITRATION, 2.

NOLLE PROSEQUI.

See PAYMENT, 3.

NOMINAL DAMAGES.

See PAYMENT, 1, 3.

828 NOTICE (SERVICE OF).

NON ASSUMPSIT.

See PAYMENT, 3.

NON-JOINDER.

See PLEA, 11.

NONSUIT.

See (BILL OF EXCEPTIONS), 1.

NOT GUILTY.

See PLEA, 13, 19, 21.

NOTICE.

See INFERIOR COURT, 4—LORD'S ACT
—ORDER (ABANDONING)—TAXA-
TION, 12—UNDEFENDED CAUSE.

NOTICE (OF ACTION).

Where, in a private act of Parlia-
ment, it is provided that no action
shall be commenced "against any
person" for any act done in pursuance
or by the authority of the statute,
unless 20 days' previous notice in
writing shall have been given to the
intended defendant:—*Held*, that this
provision would apply to the com-
pany for whose benefit the act was
passed, as well as to a single indivi-
dual. *Boyd v. The London and
Croydon Railway Company*, 721

NOTICE (OF DECLARATION).

See RULE (TO PLEAD).

NOTICE (OF MOTION).

See DISCHARGE (OF PRISONER), 2.

NOTICE (SERVICE OF).

See TAXATION, 2.

Where the Court allows notice of
declaration to be stuck up in the
Master's Office, they will not, in the
same rule, direct the service of all
future notices and rules to be made
in the same way. *Layton v. Mason*,
275

NUISANCE.

NOTICE (OF TRIAL).

See DISCONTINUANCE — TIME (FOR
PLEADING).

Where notice of trial is given for
the adjournment day, a notice of
countermand two days prior to the
day to which the Court adjourned, is
too late. *Cooper v. Whitmarsh*, 695

NON PROS.

1. The defendant obtained, and
served an order for particulars, which
operated as a stay of proceedings.
He afterwards demanded a declara-
tion, and, at the foot of the same
paper, gave notice of his abandon-
ment of the order:—*Held*, that judg-
ment of non pros., for want of a de-
claration, was irregular. *Wickens v.
Cox*, 693

2. A plaintiff, who obtains an order
for amending his writ, is not obliged
to draw it up; and if he gives notice
of abandoning the order and the writ,
and the defendant afterwards appears,
a judgment of non pros., for not de-
claring, is irregular. *Solly v. Richard-
son*, 774

3. To a declaration in debt, alleg-
ing 62*l.* to be due, for horse-meat,
&c., the defendant pleaded, 1st, as to
all the monies in the declaration men-
tioned, except as to 10*l.* 13*s.* nun-
quam indebitatus; 2ndly, as to 10*l.*
13*s.*, payment; 3rdly, as to 10*l.* 13*s.*,
payment of that sum into court.

The plaintiff did not reply to the
first two pleas, but replied to the
third, accepting the money paid into
court in full satisfaction and discharge
of the whole debt. The defendant
signed judgment of non pros. for want
of a replication to the first two pleas:
—*Held*, on motion to set it aside, that
the judgment was regular. *Emmett
v. Standen*, 591

NUISANCE.

See PLEA, 12.

OUTLAWRY.

NULLITY.

See ATTORNEY (PRIVILEGE OF), 2—
CAPIAS, 4—ESCAPE, 2.

It is no ground for treating a rule nisi for a new trial as a nullity, that it has been obtained by a different attorney from the one on the record, without an order to change the attorney. *Doe d. Bloomer v. Bransom*, 490

NUNQUAM INDEBITATUS.

See PLEA, 14, 15—PAYMENT, 4.

OMISSION.

See AMENDMENT, 5—AWARD, 3, 7—
VARIANCE, 5—WRIT (OF TRIAL), 3, 5.

OMISSION (IMMATERIAL).

See AFFIDAVIT (OF DEBT), 10—
EJECTMENT, 13.

ONUS PROBANDI.

See ARREST (WITHOUT PROBABLE
CAUSE), 2—PRISONER, 10.

ORDER (ABANDONING).

Quære, whether an order which has been served can be abandoned by mere notice to that effect, without summons? *Wickens v. Cox*, 693

OUTLAWRY.

Where the defendant has been resident abroad for four years at the time of his being outlawed, and it is only sworn, in support of an application to reverse his outlawry, *without* costs, that the plaintiff knew of his being abroad, and that a person in London received an annuity for him, and who could have given information respecting him, the Court will reverse the outlawry only on the usual terms. *Hunter v. Whitfield*, 70

PARTICULARS. 829

OYER.

Oyer being craved of the letters testamentary, of which profert is made, the plaintiff suing as executor, the will as well as the letters testamentary must be set out, and judgment having been signed by the plaintiff by default, it will be set aside for irregularity, if the proper oyer has not been given. *Daley v. Mahon*, 395

PARENT AND CHILD.

Where the father has been convicted of felony, the Court will grant a habeas corpus, in order to give the mother the custody of an infant. *Ex parte Bailey*, 311

PARTICULARS.

See NON PROS., 1—PAYMENT, 1, 2, 3.

1. In an action to recover the deposit paid upon the purchase of an estate, the defendant is entitled to a particular of the objections to the title arising from matters of fact, but not those which are matters of law. *Robson v. Rowland*, 553

2. Assumpsit for money had and received to the use of the plaintiffs commenced in 1827, and a declaration and particulars of demand delivered, but no further step taken until 1836, when a term's notice was given, and a plea demanded and delivered, the Court subsequently allowed the particulars to be amended, it appearing that the defendant had been in a confidential situation in the employment of the plaintiffs, and that their first particulars were framed on an account delivered by him, which was subsequently found to be incorrect. *Staples v. Holdsworth*, 715

3. In the particulars of objection delivered under the New Patent Act, the substantial objections must be stated in distinct and intelligible language, and the particulars must not

be confined to giving merely general information. *Fisher v. Hewitt*, 739

4. Under the New Patent Act (5 & 6 Will. 4, c. 83), the Court has the power to order amended particulars of objections intended to be urged by the defendant at the trial to be delivered, but *semble*, that, when the defendant has in his first notice alleged the invention to be old at the time of granting the letters patent, and to have been used by J. H. M., and divers other persons, it cannot require the names, addresses, and descriptions of the persons intended to be called at the trial. *Bulnois v. M'Kenzie*, 215

PARTNER.

See AFFIDAVIT (OF DEBT), 8—DEED (PRODUCTION OF), 1—INFERIOR COURT, 3.

PATENT ACT.

See PARTICULARS, 3, 4.

PAUPER.

See (SECURITY FOR COSTS), 2.

PAUPER (REMOVAL OF).

A parish is not "aggrieved," within the meaning of the 13 & 14 Car. 2, c. 12, s. 2, notwithstanding the 4 & 5 Will. 4, c. 76, ss. 79 & 84, until the actual removal of the pauper, and therefore an appeal to the sessions next after the removal is sufficiently early. *Regina v. The Justices of Salop*, 28

PAYEE.

See AFFIDAVIT (OF DEBT), 9.

PAYMENT.

See REG. GEN. p. 649.

1. In an action for wages, the particulars of demand admitted a payment on account. The plaintiff claim-

PAYMENT (COMPULSORY).

ed for his service, at the rate of 15s. per week, but the jury found that he was entitled to 7s. per week only, at which rate, deducting the sum admitted to be paid, there was nothing due. A verdict having been found for the defendant, the Court refused to disturb it, it not having been objected at the trial that the plaintiff was entitled to nominal damages, there being no plea of payment on the record. *Kenyon v. Wakes*, 105

2. *Quære*, whether a payment admitted by the particulars need be pleaded? *Ib.*

3. In an action for use and occupation, the particulars claimed "52l. 10s., being the balance of one year's rent." The defendant pleaded, as to all but 52l. 10s., non-assumpsit; and as to 52l. 10s., payment. The plaintiff took issue upon the plea of non-assumpsit, and entered a nolle prosequi as to the plea of payment. At the trial, the plaintiff proved an occupation for three half-years, at a rent of 105l. a year; the defendant proved payment of all the rent:—*Held*, that the plaintiff was entitled to a verdict for nominal damages—the plea of payment only going to part of the demand.

In such cases, the declaration should either aver a part payment, or state the real amount which the plaintiff seeks to recover. *Nichol v. Williams*, 167

4. To debt for money lent, the defendant pleaded nunquam indebitatus to all except 5l., and as to that sum a set-off, for work and labour and money paid.—*Held*, that upon these pleadings the defendant could not give evidence of the payment of the plaintiff's claim. *Cooper v. Morecroft*, 562

PAYMENT (COMPULSORY).

A. committed an act of bankruptcy on the 9th September, and on the 13th he was arrested on process is-

PAYMENT (COMPULSORY).

sued in an action commenced in the Boston Court of Requests to recover 420*l.* on a contract entered into on the 5th, and pursuant to which goods were delivered on the 7th of the same month. He deposited the amount indorsed on the writ in the hands of the sheriff, and it was paid into court, but without the additional 10*l.* for costs (under the statutes 43 Geo. 3, c. 46, s. 2, and 7 & 8 Geo. 4, c. 71, s. 2); and, on the 23rd, the plaintiff in the action obtained an order for the payment of the money out of court to him, and was then informed of the act of bankruptcy. A fiat was issued on the 28th, and assignees were appointed; and in an action by them to recover back the 420*l.*, as money had and received to their use:—*Held*, that the payment out of court was by compulsion of law, and that they were not entitled to recover. *Reynolds v. Wedd*, 728

PAYMENT (INTO COURT).

See REG. GEN. p. 648.

PAYMENT (PLEA OF).

See COSTS, 14 — DECLARATION, 1 — JUDGMENT (NON OBSTANTE VEREDICTO), 1, 3.

PEERAGE.

See PLEA, 16.

PENAL ACTION.

See AMENDMENT, 2, 3—INDORSEMENT (OF DEBT AND COSTS).

PEREMPTORY UNDERTAKING.

See REG. GEN. p. 464.

PETITIONING CREDITOR'S DEBT.

See PLEA, 9.

PLEA.

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PILOT ACT.

See COMMITMENT, 1.

PLEA.

See AMENDMENT, 1—ATTORNEY (PRIVILEGE OF), 2—COSTS, 14—HOLIDAY—ISSUES (TRIAL OF)—LACHES, 2—PAYMENT, 1, 2, 3—PLEA (ISSUABLE)—STAMP, 3.

1. To an action of trespass, a plea alleging the insolvency of the plaintiff, since the trespass, but before action brought, and that his estate is vested in the provisional assignee:—*Held*, not an issuable plea within the meaning of the Judge's order to plead issuably. *Wettenhall v. Graham*, 746

2. A plea to an action on a bill of exchange, alleging that the bill was obtained by duress, and that it was without consideration, is bad for duplicity, although the latter defence is badly pleaded. *Stevenson v. Underwood*, 737

3. To debt on a promissory note, payable twelve months after date, the defendant pleaded that one J. W., before and at the time of his death, was indebted to the plaintiff in a certain sum, and that the plaintiff, after the death of J. W., and before the making of the note, applied to the defendant for payment thereof; whereupon the defendant, in compliance with the said request, after the death of J. W., for and in respect of the said debt, and for no other consideration whatever, then made and delivered the note to the plaintiff: that J. W. died intestate, and that, at the time of the making and delivery of the note as aforesaid, no administration had been granted of the estate and effects of the said J. W., nor was there at that time any executor or executrix of his estate and effects, nor was there any person liable at that time for the said debt so remaining due to the plaintiff

as aforesaid. Replication, de injuriâ:—*Held*, that as the note *prima facie* imported consideration, the plea was bad, for want of an averment that there were no assets. *Serle v. Waterworth*, 684

4. In an action of assumpsit for money had and received to the plaintiff's use, the defendant cannot, under a plea of the general issue, give in evidence that the money was received in respect of an illegal wager. *Martin v. Smith*, 639

5. A surety for the payment of an annuity by a party, is not released from his liability by the grantor of the annuity becoming insolvent, and being discharged under the statute 7 Geo. 4, c. 57, and to an action of trespass for seizing and taking the plaintiff's goods, the defendant having pleaded a justification under a writ of *fi. fa.* issued upon a judgment entered up on a warrant of attorney given by the plaintiff jointly with the grantor, for the payment of the annuity, a replication alleging the grantor to have been discharged under the Insolvent Debtors' Act, and that thereby "the plaintiff was discharged from his liability to the defendants":—*Held*, bad on demurrer. *Hocken v. Brown*, 634

6. A plea of set-off must state that the plaintiff "still is" indebted to the defendant. *Dendy v. Powell*, 577

7. To assumpsit for money paid the defendant pleaded as to 500*l.*, parcel &c., that he was possessed of a bill of exchange drawn by him upon and accepted by C. M., for payment of 500*l.* three years after date, and thereupon, in consideration that defendant would indorse the said bill to the plaintiffs, they agreed to pay and lay out for him 500*l.* in such sums as he should require:—*Held* bad, as amounting to the general issue. *Maude v. Meesham*, 570

8. In an action on an apothecary's

bill, it is not necessary to plead that the plaintiff was not in practice prior to or on the 5th of August, 1815, or had not obtained his certificate pursuant to the 55 Geo. 3, c. 194, s. 21. *Sharpe v. Wagstaff*, 566

9. Where, in an action by the assignee of a bankrupt's estate, the defendant pleads that he was not assignee, the petitioning creditor's debt, and the validity of the commission, are put in issue by the plea. *Butler v. Hobson*, 409

10. In trover against a sheriff, who has levied under a writ of *fi. fa.*, if the act of conversion relied on is the seizure of the goods, the sheriff must plead specially a justification under the writ; but if the act of conversion be the *sale* of the goods, it seems he may give his defence in evidence, under a plea denying the plaintiff's right of possession. *Samuel v. Duke*, 536

11. A plea of the coverture of the defendant is not within the 8th section of the 3 & 4 Will. 4, c. 42, which requires pleas in abatement for non-joinder to state that the person not joined is resident within the jurisdiction of the Court, &c. *Jones v. Smith*, 557

12. A plea of user for three years before the plaintiff became possessed of his premises, is not a sufficient answer to an action on the case for a nuisance in carrying on the business of a candle-maker. *Bliss v. Hay*, 442

13. In an action against the sheriff for not levying under a *fi. fa.*, and falsely returning *nulla bona*, the plea of not guilty admits the judgment, the writ, the delivery of it to the sheriff, that there were goods in his bailiwick, and that he had notice of it. The only matters of defence available under that plea are, that he did levy within a reasonable time, and that he did not make the return alleged. *Lewis v. Alcock*, 389

PLEA.

14. The defence of non-delivery of a signed bill, in an action for an attorney's bill, must be pleaded specially, and is not available under *nunquam indebitatus*. *Robinson v. Roland*, 271

15. A plea of *nunquam indebitatus* as to all except a certain sum, and a tender of that sum, does not require a rule to plead several matters. *Archer v. Garrard*, 132

16. *Semble*, that where a party seeks to be discharged from an arrest, on the ground that he is entitled to a peerage, then the subject of dispute in the House of Lords, the application should be made to that tribunal, if sitting.—Per Lord *Abinger*, C. B. *Smart v. Johnson*, 90

17. In an action for running against the plaintiff's carriage, a plea that the damage was the result of the negligence of both parties, is bad in substance, as well as form, for it amounts to the general issue. *Armitage v. Grand Junction Railway Company*, 340

18. *Nil debet* is a good plea to an action on the 2 & 3 Edw. 6, c. 13, for not setting out tithes. *The Earl of Spencer v. Swannell*, 326

19. In an action against the sheriff for a false return, the declaration alleging a seizure by the sheriff, the plea of not guilty only puts in issue the fact of the sheriff having the money in his custody and making a false return. *Wright v. Lainson*, 146

20. In an action against the sheriff for a false return of *nulla bona*, the defence being the bankruptcy of the debtor, the Court refused to allow the defendant to plead two pleas, one traversing the seizure of the goods of the debtor, and another setting forth the dates of the act of bankruptcy and of the fiat of the defendant in the original action. *Ib.*

21. When in an action of trover for a lease, it appeared that the plain-

PLEA (OF PAYMENT). 833

tiff had delivered the indenture to a person, in order to raise money, and that he assigned it to the defendant as a security for money advanced, and which has not been paid, and the defendant pleads not guilty, and that the plaintiff was not possessed of the indenture as of his own property, the defendant may give these facts in evidence, and the plaintiff will not be entitled to recover. *Owen v. Knight*, 244

22. The plaintiff in his declaration set out a contract for the sale of not less than 5,000, or more than 6,000 trees, to be taken up at the proper time of the year, delivered to the defendant's order, and paid for on delivery. He then averred that he took up 6,000 trees at the proper time of the year, tendered them to the defendant, and he refused to accept them. The defendant pleaded that the plaintiff did not properly take up, or tender, or offer to deliver to the defendant 6,000 trees. On special demurrer, it was held that the plea was *good*, although it traversed the number of trees alleged, that having been made material by the plaintiff's averment, but *bad* for duplicity, in tendering a traverse on the taking up and offer to deliver. *Smith v. Dixon*, 47

PLEA (ISSUABLE).

See PLEA, 1.

A plea of the bankruptcy of one of the plaintiffs since the commencement of the action, is not an issuable plea, within the terms of pleading "issuably," imposed on obtaining time to plead. *Staples v. Holdsworth*, 196

PLEA (OF PAYMENT).

See COSTS, 14—DECLARATION, 1—JUDGMENT (NON OBSTANTE VEREDICTO), 1, 2.

PLEAS (SEVERAL).

See PLEA, 20.

Where there are several pleas on the record, each plea must be considered as if it stood alone. Therefore, where in an action of assumpsit the defendant by one plea denied the contract, and by another paid money into court, which the plaintiff accepted in satisfaction, and the jury found for the defendant on the first issue:—*Held*, that the defendant was entitled to retain the verdict, notwithstanding the second plea admitted the contract. *Twemlow v. Askey*, 597

2. In action for not accepting railway shares, the Court refused to allow the defendant to plead that the contract was for goods, and that there was no note in writing, together with a plea that it was a contract for an interest in land, and no such note. *Sykes v. Reeves*, 384

PLEADING.

See REG. GEN. p. 464.

PLEADING (ISSUABLE).

See PLEA, 1—PLEADING (TIME FOR).

PLEADING (RULES).

See JUDGMENT, (NUNC PRO TUNC), 1—SIMILITER, 2.

PLEADINGS (STRIKING OUT).

Where the defendant has pleaded two pleas, on one of which issue is joined, and to the other there is a replication, and he rejoins, confessing the cause of action on that pleading, and the plaintiff demurs to the rejoinder, but the defendant, instead of joining in demurrer, gives notice that he does not intend proceeding on his second plea, the plaintiff will not be entitled to judgment on the whole re-

PRISONER.

cord, but the Court will grant a rule for striking out the pleadings demurred to. *Hitchcock v. Walter*, 457

PLEADING (TIME FOR).

See PLEA (ISSUABLE).

The order for further time to plead upon the terms of "pleading issuably, rejoining gratis, &c.," applies to the plea only, and not to the subsequent proceedings. *Woodman v. Goble*, 371

POSSESSION.

See PLEA, 10.

POWER.

See WARRANT (OF ATTORNEY), 2, 3.

POWER (OF ATTORNEY).

See ATTACHMENT, 5.

PRÆCIPE.

See WRITS (SEVERAL).

PRINCIPAL.

See AFFIDAVIT (OF DEBT), 1.

PRINCIPAL (AND SURETY).

See PLEA, 5—SET-OFF.

PRISONER.

See AFFIDAVIT (OF DEBT), 11—(DISCHARGE OF), 1, 2—ESCAPE, 1, 2—HUSBAND AND WIFE—HABEAS CORPUS—IMPRISONMENT—LORD'S ACT—LACHES, 5, 6—SUPERSEDEAS.

1. "Witness, Henry King, attorney for the defendant, at his request," is a sufficient attestation within the 1 Reg. Gen. H. T. 2 Will. 4, s. 72. *Todd v. Gompertz*, 296

2. It is not necessary that the attorney's declaration, prescribed by that rule, should be in writing. *Ib.*

3. A warrant of attorney to confess judgment generally of a term, is regular, notwithstanding Reg. Gen. H. T. 4 Will. 4, (Pleading Rules), if the judgment is signed on a particular day of term. 296

4. The plaintiff's attorney cannot attest such warrant on behalf of the defendant. *Ib.*

5. In order to entitle a defendant to the benefit of 1 Reg. Gen. H. T. 2 Will. 4, s. 72, it is not necessary that he should swear *in terms* that he is a prisoner in custody on mesne process, if it appears from the statements in the affidavit that his custody must be on mesne process. *Weatherall v. Long*, 267

6. A prisoner in custody at the instance of one plaintiff, is not entitled to the benefit of 1 Reg. Gen. H. T. 2 Will. 4, s. 72, in respect of a warrant of attorney given to another plaintiff while in such custody. *Ib.*

7. It is not a sufficient compliance with 1 Reg. Gen. H. T. 2 Will. 4, s. 72, that an attorney should be named by the plaintiff, and adopted by the defendant in custody on mesne process, when executing a warrant of attorney. *White v. Cameron*, 476

8. It is no ground for calling upon the Court to order a warrant of attorney to be delivered up to be cancelled, that it was not attested in the presence of a certificated attorney, the person who acted on the defendant's behalf having described himself as such, and having been produced by the defendant himself. *Cox v. Cannon*, 625

9. It is no objection that the attorney acting for the defendant is a prisoner, *Ib.*

10. If a prisoner seeks to take advantage of 1 Reg. Gen. H. T. 2 Will. 4, s. 72, on the ground of the absence of an attorney on behalf of the prisoner, at the execution of a warrant of attorney, it is incumbent on him

to shew that he is in custody on mesne process, and it is not necessary for the plaintiff to shew that the defendant is not. *Lewis v. Gompertz*, 7

PRIVILEGE (FROM ARREST).

See DISCHARGE (OF PRISONER), 1—PLEA, 16.

PRIVILEGE (OF BARRISTER).

See BARRISTER, 2.

PROCEDENDO.

A Judge of an inferior court has no power to receive a certiorari, unless issued within the time limited by the 21 Jac. c. 23, s. 2, and therefore, where a Judge improperly allowed it, and the record was duly returned and filed, the Court nevertheless awarded a procedendo. *Laverack v. Bill*, 111

PROCEEDINGS (STAYING).

See REG. GEN. p. 647.

In an action against the acceptor of a bill of exchange the sheriff is entitled to stay proceedings commenced against himself upon payment of the debt and costs in that action only. *Ball v. Blackwood*, 589

PROCESS (SERVICE OF).

In order to entitle a defendant to set aside a notice of declaration, on the ground of not being served with process, it is not sufficient for him to swear simply that he has not been served, although it may appear by other affidavits that the service was effected on another person. *Giles v. Hemming*, 325

PROHIBITION.

See COURT (OF REQUESTS), 6.

The Quarter Sessions having allowed certain trustees' accounts, which

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it was suggested had not been audited by the parish auditors under the general vestry act, pursuant to the provisions of that statute, a prospective prohibition to the Quarter Sessions, forbidding them to allow future accounts under similar circumstances, was refused. *Ex parte the Auditors of the Parish of St. Pancras*, 534

PROMISE.

See DEMURRER (FRIVOLOUS), 1.

PROMISSORY NOTE.

See AFFIDAVIT (OF DEBT), 9—DEMURRER (SPECIAL)—PLEA, 3—REG. GEN. p. 647—VARIANCE, 2.

PROPERTY (SEPARATE).

See HUSBAND AND WIFE.

PROTEST.

See LACHES, 2—WRIT (OF TRIAL), 6.

PUBLIC OFFICER.

See MANDAMUS, 2.

QUARTER SESSIONS.

See PROHIBITION—PAUPER (REMOVAL OF).

QUO MINUS.

See EJECTMENT, 13.

QUO WARRANTO.

See CONSOLIDATION, 2.

RECORD.

See AMENDMENT, 5.

RECORD (PRODUCTION OF).

See INFERIOR COURT, 1.

RELATORS (SEVERAL).

See CONSOLIDATION, 2.

REPLICATION.

REMOVAL OF PAUPER.

See PAUPER (REMOVAL OF).

RENDER.

See SUPERSEDEAS, 1.

RENT.

Although, in an indenture by which premises are demised by the plaintiff to one A. C., by whom they are assigned to the defendant, it is provided that, in the event of there being rent in arrear, the plaintiff shall re-enter, "as if the indenture had never been made," the plaintiff is entitled to recover in an action of covenant for the rent reserved, which accrued before the re-entry. *Hartshorne v. Watson*, 404

REPLEVIN.

See VARIANCE, 4.

REPLICATION.

See ATTORNEY (PRIVILEGE OF), 3—COUNTS (STRIKING OUT), 3—HOLIDAY—INFERIOR COURT, 4—NON PROS., 3—PLEA, 3.

1. In assumpsit by indorsee against acceptor, the defendant pleaded a plea which was bad for duplicity. The plaintiff replied de injuriâ. On demurrer, the replication was held to be good. *Reynolds v. Blackburn*, 19

2. Where the replication de injuriâ is inadmissible, the objection can only be taken on special demurrer. *Parker v. Riley*, 375

3. To an action for work done by the plaintiff's testator as an attorney and solicitor, the defendant pleaded that the work was done by one R. S. in the name of the testator; that R. S. was not qualified to act as an attorney; and that the testator, knowing him to be unqualified, permitted him to use his name:—*Held*, that the replication de injuriâ was bad. *Ib.*

4. *Semble*, that the plaintiff cannot, by his replication to a plea of "mutual credit," put in issue the credit given by the defendant to the bankrupt, the debt due from the bankrupt to the defendant, and also the credit given by the bankrupt to the defendant. *Hulme v. Muggleston*, 112

5. To *indebitatus assumpsit* for goods sold and delivered, and on an account stated, the defendant pleaded as to 18s. 6d., parcel, that they were sold on a Sunday, in the way of the plaintiff's trade and business. Replication, that although the goods were sold at the time, and in the manner stated, still that the defendant kept and detained the same without offering to return them, whereby he became liable to pay for them on a quantum valent. On demurrer to the replication, it was held bad, on the ground that it ought to have shewn a new promise to pay after the retaining of the goods by the defendant. *Simpson v. Nicholls*, 355

6. *De injuriâ* is a good replication on general demurrer to a plea, in an action on a cheque, that it was given for a gambling debt. *Curtis v. Headfort*, 496

7. *Assumpsit*, by indorsee against acceptor of two bills of exchange. Plea, that at the time of accepting the bills, the defendant was indebted to J. M. (the drawer), and that the bills were accepted in respect of parcel of the said debt: that before the bills became due, he (the defendant) was indebted to other persons, and, being embarrassed in his circumstances, by an instrument in writing between J. M., the other persons, and defendant, after reciting that a proposal had been made that the defendant should pay his creditors a composition of 7s. in the pound, they, the said creditors, promised and agreed to and with the defendant, that after payment of the said composition, they would not sue,

arrest, &c., the defendant for any debts then due to them from him, and that in case they should act contrary thereto that instrument might be pleaded in bar to any action. The plea then averred payment of the composition, and that J. M. paid to the plaintiff divers sums of money sufficient to discharge and satisfy all consideration whatsoever in respect of the indorsement of the said bills, and all sums of money due from J. M. to the plaintiffs on the bills, and all claims and demands of the plaintiff in respect of the said bills. Replication *de injuriâ*:—*Held*, that the plea was in effect in accord and satisfaction, and not in excuse, and therefore that the replication *de injuriâ* was bad on special demurrer. *Jones v. Senior*, 701

REPUTED OWNERSHIP.

Where, after a commission of bankruptcy, the bankrupt is allowed to remain in possession of newly acquired property as reputed owner, with the consent of the assignee, the goods are liable to be seized by the assignees of the Insolvent Debtors' Court, the bankrupt becoming subsequently insolvent. *Butler v. Hobson*, 409

RESTITUTION (WRIT OF).

See EJECTMENT, 26, 27.

REVERSION.

See VENUE.

REVERSIONARY INTEREST.

See AFFIDAVIT (OF DEBT), 6.

REVISING BARRISTER.

See COURT OF REQUESTS, 5.

REVOCATION.

See AWARD, 4.

RULE (TO COMPUTE).

See COUNTS (STRIKING OUT), 2.

RULE (OF COURT).

See REG. GEN. p. 394.

RULE (ENLARGEMENT OF).

See AWARD, 5.

RULE (TO PLEAD).

It is not irregular to enter a rule to plead before service of notice of declaration, provided the notice of declaration be served on the same day. *Aitman v. Conway*, 76

RULE (REVIVING).

Where a defendant resides such a distance from town that he cannot be served before the day for shewing cause, and the term expires on the day after that day, the rule may be revived in the next term. *Rowbottom v. Ralphs*, 291

RULE (SERVICE OF).

See ATTACHMENT, 4.

Where a copy of a rule nisi has been sent in a letter by post to a defendant resident in the country, together with the original rule, and the latter is received back, indorsed, "received a copy of the within rule," and that indorsement is signed by the defendant, it will be deemed sufficient service. *Smith v. Campbell*, 728

SALE.

See PLEA, 10.

SCIRE FACIAS.

See DEBT, 3—EJECTMENT, 26.

1. Where judgment is sought to be signed on a writ of sci. fa. against country bail, notice must, since 1 Reg. Gen. H. T. 2 Will. 4, s. 81, be served

SECURITY FOR COSTS.

upon them, or something equivalent to notice done. *Saunderson v. Brown*, 9

2. Notice of a sci. fa. returnable on the 19th, and served on the 18th, two days' post from London, on country bail, a render on the 24th is in time. *Ib.*

3. *Semble*, that where notice of a sci. fa. is served on country bail before the return day of the writ, the bail have, pursuant to the above rule, eight days from the return day to render their principal. *Ib.*

SECONDARY EVIDENCE.

See INFERIOR COURT, 5.

SECURITY FOR COSTS.

See AMENDMENT, 3—ATTORNEY (UNDERTAKING OF).

1. Three days' notice to the plaintiff's attorney of an intention to move the Court that the plaintiff give security for costs, is not equivalent to a demand and refusal, and the Court will not grant a rule upon such a notice. *Huntley v. Bulmer*, 633

2. If an infant lessor in ejectment is a pauper, the Court will require him to find some person to be security for the defendant's costs. *Doe d. Roberts v. Roberts*, 556

3. Where, after joinder in demurrer to the declaration in April, the plaintiff becomes bankrupt in June, but in September obtains his certificate, the Court will not compel him to give security for costs in Michaelmas Term, the assignees refusing to interfere in the action. *Beckham v. Knight*, 227

4. In order to obtain a rule for security for costs, on the ground of the plaintiff residing out of the jurisdiction, it must be positively sworn that he is so resident, and "belief" to that effect is insufficient. *Sandys v. Hohler*, 274

5. If an independent foreign sovereign seeks to enforce the performance of a commercial contract in the Eng-

SEVERAL PLEAS.

lish Courts, he will be liable to give security for costs. *Otho, King of Greece v. Wright*, 12

6. The defendant is not too late in his application, if he applies promptly after the delivery of a *materially amended* declaration, although he has pleaded to the *original* declaration. *Ib.*

7. *Semble*, if the defendant does not require a stay of proceedings, it is incumbent on the *plaintiff* to shew that the defendant has not applied to the former for security previous to obtaining the rule. *Ib.*

SEIZURE.

See PLEA, 10.

SEPARATE PROPERTY.

See HUSBAND AND WIFE.

SET-OFF.

See PLEA, 6.

A plaintiff having given a guarantee for the payment of 1,600*l.*, and any other sums which might be advanced to his son by the defendant, a claim in respect of money so advanced on the guarantee, is not the subject of a set-off to a declaration for money had and received, and on an account stated. *Morley v. Inglis*, 02

SETTING ASIDE PROCEEDINGS.

See PROCESS (SERVICE OF).

SEVERAL DEFENDANTS.

See CONSOLIDATION, 2.

SEVERAL MATTERS (RULE TO PLEAD).

See PLEA, 15.

SEVERAL PLEAS.

See PLEA, 20.

SIMILITER.

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SEVERAL RELATORS.

See CONSOLIDATION, 2.

SHERIFF.

See ARREST (IRREGULAR). — ATTACHMENT, 2, 3, 5, 8, 10 — BILL (OF EXCEPTIONS), 2 — DECLARATION, 3, 5 — DEPOSIT (IN LIEU OF BAIL), 2 — EXECUTION — ESCAPE, 1, 2 — INTERPLEADER, 3, 4 — LACHES, 6 — PLEA, 10, 13, 19 — SLANDER — TRESPASS, 3, 4 — TRIAL (NOTICE OF), 1 — VARIANCE, 1.

SHORT (NOTICE OF TRIAL).

See TIME (FOR PLEADING) — TRIAL (NOTICE OF), 1.

SICKNESS.

See AFFIDAVIT (OF DEBT), 11.

SIMILITER.

See HOLIDAY:

1. The rule of H. T. 4 Will. 4, which requires every pleading to be dated, does not apply to a *similiter* added by one party for the other. *Shackel v. Ranger*, 562

2. It is no objection to a verdict that no *similiter* has been added, if there is an "&c." at the end of the replication. *Handford v. Handford*, 473

3. The omission of a formal *similiter* is sufficiently supplied by an "&c.," although the omission is in the issue itself. *Brook v. Finch*, 313

4. *Semble*, that the rule of 1 Reg. Gen. H. T. 2 Will. 4, s. 65, as to motions in arrest of judgment, only applies to trials in term. *Ib.*

5. Where a replication traversed the facts contained in the plea, and concluded to the country, but without an "&c.," and no *similiter* was added:—*Held*, that the omission might be considered as a misprision of the clerk, and amendable after

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verdict, judgment, and writ of error brought. *Siboni v. Kirkman*, 98

SLANDER.

See CRIMINAL INFORMATION.

Where, on the execution of a writ of inquiry, in an action for slander, the jury are incorrectly informed by the under-sheriff that any amount of damages will carry costs, and they find for less than 40s., that is no ground for a new writ of inquiry, or for increasing the amount of the verdict. *Grater v. Collard*, 503

SLAVERY.

The rule for filing a certificate and signed taxation pursuant to the 6 & 7 Will. 4, c. 5, s. 10, is nisi in the first instance. *Maynard v. Lackington*, 1

SMALL DEBTOR.

1. A defendant is entitled to his discharge under the 48 Geo. 3, c. 123, although he may have been brought up under the Lords' Act, and claimed his sixty days, which period is unexpired. *Venner v. Oxenham*, 766

2. A defendant who has given a cognovit for debt and costs exceeding 20*l.* is entitled to his discharge under the 48 Geo. 3, c. 123, if the original debt were under 20*l.* *Rathbone v. Fowler*, 81

SOLICITOR (UNDERTAKING OF).

The Court will not summarily enforce an undertaking given by an attorney who is also a solicitor, in a suit in Chancery. *In re Garland*, 512

SPECIAL JURY.

See COSTS, 8—REG. GEN. p. 394.

SUBPCENA.

SPECIAL VENIRE.

See DEBT, 4.

STAMP.

1. The objection that a cheque is post-dated, and therefore requiring a stamp, is not too late after it has been read without objection. *Field v. Woods*, 23

2. If unstamped, it cannot be used in evidence. *Ib.*

3. It is not necessary to plead specially the fact of the post-dating. *Ib.*

STAY (OF PROCEEDINGS).

See COSTS, 6—DEPOSIT (IN LIEU OF BAIL), 1—NON PROS, 1.

1. On an application under the 7 Geo. 2, c. 20, s. 1, the mortgagor sufficiently shews himself to have become the defendant in the action of ejectment, by swearing "that he had entered the usual appearance," without proceeding to state that he had entered into the consent rule. *Doe d. Cox v. Brown*, 471

2. A stay of proceedings cannot be incorporated in a rule nisi for costs of the day for not proceeding to trial, *Eagar v. Cutthill*, 125

STATUTE OF FRAUDS.

See PLEAS (SEVERAL), 2.

STET PROCESSUS.

See JUDGMENT (AS IN CASE OF A NON-SUIT), 4.

STRANGER.

See COSTS, 16—DEED (PRODUCTION OF), 2.

SUBPCENA.

See ATTORNEY, 5—DEED (PRODUCTION OF), 1—WITNESS, 2.

SUPERSEDEAS.

SUMMONS.

See COURT OF REQUESTS, 3—INDORSMENT (OF DEBT AND COSTS)—LACHES, 7—WRIT (OF TRIAL), 5.

1. If the service of a writ of summons is irregular, a rule to set aside both service and copy of the writ does not require too much. *Argent v. Reynolds*, 480

2. Where a copy of a writ of summons commenced "William the Fourth," instead of "Victoria," the Court set aside the service. *Drury v. Davenport*, 162

3. *Semble*, that the proper means of taking advantage of an error in the recital of the date of the writ of summons in the writ of trial, is to apply to the Court to amend the record at the cost of the plaintiff. *Percival v. Connell*, 68

SUNDAY.

See REPLICATION, 5—TIME (COMPUTATION OF), 2.

SUPERSEDEAS.

1. Where the trial took place at the sittings after Trinity Term, final judgment in Michaelmas Term, and in the following vacation, the defendant rendered in discharge of his bail:—*Held*, that by the rule of this Court (Exchequer) of T. T. 26 & 27 Geo. 2, the defendant should be charged in execution in Hilary Term. *Baxter v. Bailey*, 559

2. When an action against a prisoner is tried in vacation, the plaintiff must charge him in execution before the end of the following term. *Foulkes v. Burgess*, 109

3. When a prisoner prevents a plaintiff from declaring in due time, by reason of an order of the Court of Chancery, that is not a case requiring notice within the rule of H. T. 2 Will. 4, s. 87. *Lewis v. Gompertz*, 124

TAXATION. 841

SURETY AND PRINCIPAL.

See PLEA, 5.

SURVEYOR.

See AFFIDAVIT (OF DEBT), 6.

SURVIVOR.

See WARRANT (OF ATTORNEY), 3.

TAXATION.

See ARBITRATION, 1—COSTS, 7—WAIVER, 1.

1. Where a party applies for a review of the taxation of costs and the taxation is referred back to the Master, he is not entitled to the costs of the rule upon which the review is sought for and obtained. *Parsons v. Pitcher*, 600

2. Notice of taxation, given before nine o'clock in the evening, for twelve o'clock on the following day, is a good day's notice within the rule of T. T. 1 Will. 4. *Edmunds v. Cates*, 667

3. Where an action has been brought for a bill of costs for business done in prosecuting a felon at the Central Criminal Court, a Judge at chambers has the power to make an order to refer the bill to the Master for taxation. *Curling v. Sedger*, 759

4. Where it appeared by an attorney's account that he had paid 15*l.* 5*s.* for discontinuance of an action, and he had also done other business for the plaintiff which was not taxable, the Court refused to compel him to deliver a signed bill, he having sworn that he had not made, and did not intend to make any charge in respect of the action.

Quære, whether costs paid by an attorney for his client, on discontinuance of an action, is a taxable item? *Sparrow v. Jones*, 554

5. Where, on reference of an attor-

ney's bill to taxation, the parties agree to waive the delivery of a signed bill, *prima facie* they waive the operation of the 2 Geo. 2, c. 23, as to payment of the costs of taxation. *Gerrard v. Arnold*, 336

6. The rule of the Exchequer, requiring the delivery of a bill of costs previously to taxation, does not apply to cases in which the defendant has not appeared. *Burch v. Poynter*, 387

7. If, in a short cause, an attorney wilfully makes a charge, however small, to which he is not entitled, the Court will not allow him the costs of taxation, though less than one-sixth is taken off. *Holderness v. Barkwith*, 392

8. Where, in an action on a bill of costs, a verdict is taken by consent for the plaintiff, subject to the taxation of the bill within the first five days of the next subsequent term, and the defendant omits to adopt measures to procure the taxation of the bill, the plaintiff is entitled to sign judgment in the ordinary way, and to tax his bill of costs in the action. *Tucker v. Neck*, 231

9. A writ of inquiry in an action of covenant for unliquidated damages is within the Directions to Taxing Officers of H. T. 4 Will. 4, prescribing a reduced scale of taxation. *Croft v. Miller*, 73

10. A judgment on demurrer is not within the rule of the Exchequer, which requires a copy of the bill of costs and affidavit of increase to be delivered to the opposite party at the time of service of notice of taxation. *Taylor v. Murray*, 80

11. An omission to comply with the above rule is no ground of setting aside the judgment and execution, but only of reviewing the taxation of costs. *Ib.*

12. Where a cognovit is given, with liberty, in case of default in pay-

ment of the debt and costs, to enter up judgment for *debt and costs*, it is irregular to sign judgment before the costs are taxed, unless the plaintiff means to waive his right to costs, in which case he should give the defendant notice of such intention. *Booth v. Lady Hyde Parker*, 87

13. Assumpsit referred to arbitration without a verdict being taken, and the arbitrator awarded a sum less than 20*l.*:—*Held*, that this was a sum "recovered" within the meaning of the "Directions to Taxing Officers," and that the costs were to be taxed upon the lower scale. *Wallen v. Smith*, 103

TAXES.

See DEBT, 3.

TENDER.

See COSTS, 7, 10—PLEA, 15.

TERM.

See ATTORNEY (ADMISSION OF), 2—EJECTMENT, 7—LORDS' ACT—PRISONER, 3—SUPERSEDEAS, 2.

TESTE.

See HABEAS CORPUS.

TIME.

See DEMURRER (FRIVOLOUS), 1—JUDGMENT (ARREST OF)—REG. GEN. p. 464.

TIME (COMPUTATION OF).

1. In computing the time of credit on a mercantile contract, the day on which the contract was made is to be excluded from the reckoning. *Webb v. Fairmaner*, 549

2. When a declaration is delivered on Saturday, the Sunday immediately following is reckoned in the computation of time. *Shoebridge v. Irwin*, 126

TRESPASS.

TIME (FOR PLEADING).

On the 5th September, the defendant obtained a month's further time to plead, *taking short notice of trial for the first sittings in term*:—*Held*, that, nevertheless, the enlarged time did not commence until after the 24th October. *Le Fevre v. Molineaux*, 153

TITHES.

See PLEA, 18.

TITLE.

See COSTS, 13 — DECLARATION, 2 — PARTICULARS, 1.

TRANSLATION.

See FINES AND RECOVERIES, 2.

TRESPASS.

See COSTS, 3, 5, 11, 13—PLEA, 1.

1. Trespass will not lie against a party who lays a complaint before a magistrate on a subject-matter over which he has a general jurisdiction, and the magistrate thereupon grants a warrant, although the particular case is one in which the magistrates had no jurisdiction. *West v. Smallwood*, 580

2. Trespass will lie against husband and wife for their joint act. *Vine v. Saunders*, 233

3. Trespass for false imprisonment. The defendant, as sheriff, justified under an attachment out of Chancery for a contempt, and alleged that no order for the plaintiff's discharge had been made, and no ha. cor. sued out. Replication, that plaintiff had been kept in custody for more than thirty days without being brought up to the Court, and without being cleared of the contempt; that therefore it was the duty of the defendant to discharge the plaintiff, pursuant to 11

TRIAL (BY PROVISIO). 843

Geo. 4 and 1 Will. 4, c. 86, s. 15, rule 5, but that defendant, though requested, would not:—*Held*, that, on the face of these pleadings, nothing shewed the defendant to be a trespasser ab initio. *Smith v. Eggington*, 38

4. *Semble*, that in such a case trespass is not maintainable against the sheriff. *Ib.*

5. *Semble*, that case could not be maintained without notice to the sheriff for what contempt the prisoner was in custody, because the rule in question does not apply to all contempts. *Ib.*

TRIAL.

See COSTS, 2, 17—JUDGMENT (ARREST OF).

The Court will not compel a defendant to submit to terms as to the time of proceeding to trial, although he may be the only defendant who has entered into the proper recognisances, and great delay may be the result of not so interfering. *The King v. Hunt*, 5

TRIAL (NOTICE OF).

See DISCONTINUANCE — NOTICE (OF TRIAL)—TIME (FOR PLEADING).

1. The rule which requires a plaintiff, having permission to give short notice of trial for a particular sittings, to try at those sittings, or give full notice, applies equally to the case of a trial before the sheriff. *Dignam v. Mostyn*, 547

2. The retaining an irregular notice of trial, is not a waiver of the irregularity. *Ib.*

TRIAL (BY PROVISIO).

The plaintiff having sued under a contract for the purchase of books, and the defendant, before the trial of the action, having become a bankrupt, the plaintiff proved the price of

the books under the fiat; but the defendant having obtained his certificate, was held to be still entitled to proceed to trial by proviso. *Whitaker v. Mason*, 429

TRIAL (BY RECORD).

See VARIANCE, 1.

TROVER.

See AFFIDAVIT, 1—PLEA, 10, 21.

TRUSTEES (ACCOUNTS OF).

See PROHIBITION.

UNDEFENDED CAUSE.

If a cause is brought on pursuant to notice of trial in its turn at the last sittings in term, when the Marshal's notice announces that none but undefended causes will be then taken, the defendant must, in order to prevent the case from being tried as an undefended cause, either instruct counsel to appear and say it is defended, or give notice to the plaintiff that it is a defended cause. *Bland v. Warren*, 21

UNLIQUIDATED DAMAGES.

See INTERPLEADER, 1—TAXATION, 9.

USE AND OCCUPATION.

See VENUE.

USER.

See PLEA, 12.

VACATION.

See ATTORNEY (ADMISSION OF), 2—EJECTMENT, 7—HOLIDAY,—LACHES, 2—LORDS' ACT—REG. GEN. p. 394—SUPERSEDEAS, 1, 2—TIME (FOR PLEADING).

VARIANCE.

VARIANCE.

See LOCAL COURT—LACHES, 1.

1. In an action for a false return, the declaration bore date 13th July, 1837, Victoria having then acceded to the throne, and alleged the recovery of a judgment in the K. B. in the 7th year of the reign of the late king, as appeared by the record "still remaining in the said Court of our said lord the king, before the king himself." On motion for judgment on production of the record:—*Held*, no variance. *Lewis v. Alcock*, 78

2. Where an affidavit to hold to bail stated the defendant to be indebted upon a promissory note drawn by him, payable to T. F., and by T. F. indorsed to the plaintiff; and it appeared by the declaration that there was an intermediate indorser:—*Held*, not to be such a variance as to discharge the bail. *Luce v. Irwin*, 92

3. A variance between the issue and the writ of trial may be amended at any time. *Farnwig v. Cockerton*, 337

4. Where, in replevin, the defendant avowed for three quarters of a year's rent under a holding from him, and at the trial, the principal question was whether the rent was 115*l.* or 100*l.*, and whether it was quarterly or half yearly, and the jury found that it was 115*l.*, and that it was half-yearly, and that finding was entered on the record, the Court allowed the avowry to be amended under the 3 & 4 Will. 4, c. 42, s. 24, although the plaintiff gave notice of his intention to oppose any amendment, and to rely on the variance. *Gaylor v. Farrant*, 426

5. In an action of debt the defendant pleaded several pleas, to one of which the plaintiff demurred, and issue was joined on the others. The plaintiff gave notice of trial before the sheriff, and that the jury would then assess

VENUE.

the damages on the demurrer. The award of venire contained in the issue was "as well to try the issues joined as to inquire what damages the plaintiff hath sustained by occasion of the premises whereof the parties have put themselves upon the judgment of the Court, if judgment should happen to be given for the plaintiff." These words were omitted in the writ of trial, and the plaintiff gave the defendant notice that he did not mean to assess the damages:—*Held*, that the variance was immaterial. *Hiam v. Smith*, 710

VENIRE.

See VARIANCE, 5.

VENIRE (DE NOVO).

1. Where a declaration contains a bad and a good count, and there is a general verdict for the plaintiff, the Court will not arrest the judgment, but will award a venire de novo. *Airey v. Fearnsides*, 654

2. A venire de novo cannot be awarded where general damages are assessed upon a declaration containing a misjoinder of counts. *Corner v. Shove*, 688

3. After a rule for arresting the judgment was disposed of, but in the same term, the plaintiff moved for a venire de novo:—*Held*, that the application was not too late. *Ib.*

VENIRE (SPECIAL).

See DEBT, 4.

VENUE.

See AFFIDAVIT, 2—BARRISTER, 1.

Quære, as to whether an action for use and occupation, by the assignee of the reversion against lessee is local? *Mortimer v. Preedy*, 544

WARRANT, &c. 845

VERDICT.

See ARBITRATION, 2, 3—TAXATION, 13—WRIT (OF TRIAL), 1.

VERIFICATION.

See FINES AND RECOVERIES, 3.

VOID CONTRACT.

See CONTRACT VOID.

WAGER.

See PLEA, 4.

WAIVER.

See AFFIDAVIT (OF DEBT), 11—ARBITRATION, 3—LACHES—STAMP, 1—TAXATION, 5, 12—TRIAL (NOTICE OF), 2—WRIT (OF TRIAL), 6.

1. Where three defendants are arrested on a bailable writ, one of whom, being an administratrix, is discharged, but the others go to prison, although the plaintiff shall declare against the remaining two defendants only, they cannot set aside the declaration for irregularity, after having pleaded. *Bartrum v. Williams*, 397

2. And where in such a case the plaintiff signed judgment for want of a rule, it was held that the defendant did not waive the irregularity by attending the taxation of costs and making no objection. *Archer v. Garrard*, 132

WARRANT (OF ATTORNEY).

See PRISONER, 1, 6, 7, 8, 9.

1. In order to sign judgment on an old warrant of attorney, it is sufficient in support of an application on the 10th of May, to produce a letter from the defendant, dated the 27th of April, at Nice. *Grantley v. Summers*, 478

2. The Court will not allow judgment to be entered up on a warrant of attorney at the instance of an execu-

tor, where the testator only has been mentioned in the warrant, although it is stated in the defeasance that the "executors and administrators" might enter up judgment in the event of a certain sum not being paid. *Foster v. Clagget*, 524

3. Where a warrant of attorney is executed to two persons, and one dies, the survivor may enter up judgment in his own name. *Hind v. Kingston*. 523

4. *Semble*, that the Court will not grant permission to enter up judgment on an old warrant of attorney, executed by a marksman, where it is only sworn that the warrant was "duly executed," and it is not stated that it was read over to the defendant. *James v. Harris*, 184

WARRANT OF ATTORNEY (TO PROSECUTE AND DEFEND).

See REG. GEN. p. 464.

WITNESS.

See ATTORNEY, 5—Costs, 9, 15—INFERIOR COURT, 3.

1. The fact of a plaintiff not proceeding promptly in a cause, is no answer to a rule for examining a material witness on interrogatories, who is going abroad. *Weekes v. Pall*, 462

2. If the attorney of the party who has subpoenaed a witness gives him leave to be absent until a particular time, and in the interim, the cause is called on in the absence of the witness, the latter is not liable to an attachment for a contempt. *Fartah v. Keat*, 470

WRIT.

See INDORSEMENT (OF DEBT AND Costs)—LACHES, 1.

WRIT (OF TRIAL).

WRIT (SERVICE OF).

See PROCESS (SERVICE OF).

WRITS (SEVERAL).

It is not irregular to issue two writs, either of summons or capias, against several defendants for the same cause of action, provided the writs are issued upon one præcipe, and bear date the same day. *Angus v. Coppard*, 137

WRIT (OF TRIAL.)

See BILL (OF EXCEPTIONS), 2—JUDGMENT (AS IN CASE OF A NONSUIT), 9—SUMMONS, 3—VARIANCE, 3.

1. Where, on trial before the sheriff, a verdict is found for less than 5*l.* in favour of the plaintiff, the Court will not disturb it, on the ground of its being against evidence. *Fleetwood v. Taylor*, 796

2. The declaration stated that in consideration that the plaintiff would buy of the defendant a certain horse for 7*l.* 2*s.* 6*d.*, the defendant promised the plaintiff that it was a quiet worker, and would go well in spare harness. It then averred the purchase of the horse, and that it was not a quiet worker, and would not go well in spare harness, whereby the plaintiff was put to charges in keeping and taking care of it. There were also counts for money had and received, and money due on an account stated:—*Held*, that this record might be sent for trial before the sheriff, under the 3 & 4 Will. 4, c. 42, s. 17. *Allen v. Pink*, 668

3. It is a ground for arresting judgment on a verdict on a writ of trial, if that part of the form given by the rules of H. T. 4 Will. 4, which gives jurisdiction to inferior Courts to try issues from the superior ones, is omitted. *Handford v. Handford*, 473

WRIT (OF TRIAL).

4. A writ of trial, directed to the Sheriff's Court of London, was returnable on the 19th January, 1838. A Court was holden on the 18th, and adjourned to the 20th, on which day the cause was tried.

Semble, that the Court had no jurisdiction to try the cause. *Mortimer v. Preedy*, 544

5. When the date of the writ of summons is omitted in the issue, but is

WRIT (OF TRIAL). 847

supplied in the writ of trial, the writ of trial will be set aside, with costs for irregularity. *Blissett v. Tenant*, 436

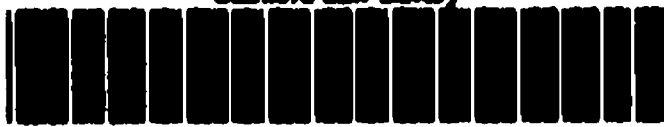
6. The objection is not waived by the defendant's appearing by his attorney at the trial, and allowing the cause to proceed, under protest. *Ib.*

7. The word "impleaded" in a writ of trial means that the action was commenced. *Robinson v. Roland*, 271

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